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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 159.

MARY A. HOYT (NOW MARY A. VESTEL) AND JOHN W. GONN, PLAINTIFFS IN ERROR,

vs.

JOSEPH H. RUSSELL.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

FILED NOVEMBER 1, 1882.

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INDEX.

	Original.	Print.
Complaint	1	1
Answer	4	2
Supplemental answer	10	4
Replication	16	6
Testimony of J. H. Russell	18	7
B. F. Marsh	19	7
Notice of location of J. H. Russell lode	20	8
Testimony of J. P. Flick	21	8
Geo. Foote	23	9
Map and plat	24	9
Testimony of A. M. Esler	27	10
Chas. Perry	29	11
R. B. Harrison	30	11
Harpin Davis	32	11
Alex. McDonald	32	12
J. H. Frost	32	12
A. M. Esler (recalled)	33	12
David H. Gilmore	34	12
John W. Gonn	36	13
Notice of location of Mammoth lode	37	13
Bill of exceptions	39	14
Instructions (plaintiffs')	43	16
(defendant's)	44	16

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	Original.	Print.
Verdict	53	19
Judgment and decree	53	20
Notice of motion for new trial	55	20
Assignment of errors	57	21
Order overruling motion for new trial	59	22
Defendant's exception	59	22
Undertaking on appeal	60	22
Notice of appeal	63	23
Clerk's certificate	64	24
Proceedings in Supreme Court	65	24
Opinion of court	66	24
Judgment on appeal	71	26
Writ of error	72	26
Bond	74	27
Citation	77	28
Clerk's certificate	79	29

1 In the District Court, 3rd Judicial District, Lewis and Clarke County, Montana Territory.

JOSEPH H. RUSSELL *vs.* MARY A. HOYT *et al.*

Be it remembered that among the records and proceedings of the said court, in the above-entitled cause, are the following, to wit:

On the 21st day of January, A. D. 1878, the plaintiff filed his complaint against the defendant, which complaint is as follows, to wit:

In the District Court, 3rd Judicial District, Lewis & Clarke County, Montana Territory.

JOSEPH H. RUSSELL, Plaintiff,
vs.
MARY A. HOYT and JOHN W. GONN, Defendants.

Now comes the plaintiff and complains of the defendants, and alleges that heretofore, to wit, on the day and date hereinafer
2 mentioned, this plaintiff was, and ever since has been, and now is, the owner of, possessed, and entitled to the possession of the following-described mining property, to wit, The J. H. Russell lode, situate in ten mile mining district, Lewis & Clarke county, Montana Territory, and particularly that portion thereof, described as follows, to wit: Beginning at the N. W. corner of said lode, thence N. 79° east $735\frac{8}{100}$ feet; thence S. 0° 30″ W. 107 feet; thence S. 79° W. $190\frac{1}{2}$ feet; thence S. 89° 30′ W. $528\frac{3}{100}$ feet; thence N. 11° W. 10 feet, embracing one and $\frac{17}{100}$ acres. The said J. H. Russell lode being a quartz lode of silver, bearing rock or ore, and is known as lot No. 77, township 8, N. range, 3 west. That on the 25th day of October, A. D. 1877, said defendant, Mary A. Hoyt, made her application, No. 554, in the general land office at Helena City, in the county and Territory aforesaid, to enter said portion of said J. H. Russell lode claim, hereinbefore particularly described, and the said defendants still claim the title and right of possession of said property, and are endeavoring to procure a United States patent therefor. That on the 24th day of December, 1877, this plaintiff duly interposed his adverse claim to said application, which
3 hath ever since been, and now is, on file in said land office; that said plaintiff was the owner of and lawfully seized and possessed of said property long prior to any claim, or pretended claim, of said defendants, or either of them, and hath ever since been, and now is, the owner thereof; that the said claim of defendants is a cloud upon the title of plaintiff, and that his said application for a patent will greatly embar-ass said plaintiff's title; that in pursuance of the statute in such case made and provided this plaintiff brings his suit to determine his right of possession to said property, and to have the said pretended claim of defendants adjudicated and decreed as worthless.

Wherefore plaintiff prays that by a proper decree of this court he may be declared entitled to the possession and occupancy of said property and the enjoyment thereof; that the said claim of defend-

ants be declared null and void, and that plaintiff recover his costs in this behalf expended.

E. W. TOOLE,
Att'y for Plaintiff.

4 TERRITORY OF MONTANA, }
County of Lewis & Clarke, } ss:

Joseph H. Russell, plaintiff, makes oath and says: That he has heard the foregoing complaint read and knows the contents thereof, and that the same is true, of his own knowledge, except as to such matters as are therein stated on information and belief, and as to those matters he believes it to be true.

J. H. RUSSELL.

Subscribed & sworn to before me, this 21st day of January, A. D. 1878.

A. H. BEATTIE, *Clerk.*

And on the 14th day of March, A. D. 1878, the said defendants filed their answer to said complaint in words & figures following, to wit:

Answer.

In the District Court, 3rd Judicial District, Lewis & Clarke County, Montana Territory.

JOSEPH H. RUSSELL, Plaintiff, *vs.* MARY A. HOYT *et al.*, Defendants.

5 The defendants, answering the complaint of plaintiff, deny: 1. That said plaintiff on or at any time since the 13th day of May, 1873, was, or now is, the owner of, or possessed of, or entitled to, the possession of any portion of the premises described in his complaint as the J. H. Russell lode. And defendants, further answering said complaint, allege that on the 13th day of May, 1873, John W. Gonn and E. M. Hoyt, being at that time citizens of the United States, discovered upon public lands of the United States, in Tenmile unorganized mining district, in Lewis & Clarke county, Montana Territory, a valuable mineral deposit, to wit, a silver-bearing quartz lode, which they named the Mammoth lode, and proceeded to stake said lode by placing a substantial stake, marked "A," 150 feet northwesterly from the center of discovery hole, in a line drawn at right angles with the general apparent course of the lode, running thence northeasterly along the northerly side of said lode to a stake marked "E," 750 feet from stake "A;" thence southerly along the easterly line 200 feet to a stake "D;" thence southerly 1,500 feet along the southerly side line to a stake marked "E;" thence
6 northeasterly along the westerly end line to a stake marked "B," 200 feet; thence northeasterly to the place of beginning. And thereafter, on the 29th day of May, 1873, filed in the recorder's office of said Lewis & Clarke county, Montana Territory, a declaratory statement in writing on oath describing and giving notice of said claim, in which notice it was stated and set forth that the

defendants herein claimed 750 linear feet thereof northeast from the center of discovery hole, whereby they became the owners thereof and entitled to the exclusive possession thereof. That thereafter the said John W. Gonn, by good & sufficient deed, conveyed all his interest therein to defendant, Mary A. Hoyt, who is now the owner thereof. That thereafter, on the 25th day of October, 1877, the said Mary A. Hoyt filed her application for a patent (after having procured said premises to be surveyed) in the said land office of the United States in Helena aforesaid; in which said application the said premises so located and claimed by said John W. Gonn and Mary A. Hoyt was described as follows, to wit:

7 Seven hundred and nineteen linear feet of the Mammoth lode situated in Ten-mile (unorganized) mining district, Louis & Clarke county, Montana Territory, in township number 8 north, range 5 west. Beginning at corner number 1, a granite stone 24 x 14 x 10 inches, and running thence south ½ degree west 200 feet to corner No. 2, from which initial point No. 2 of Ten-mile district bears south 60 degrees 15 min. W., distant 63.30 chains; thence N. 89½ deg. E., 719 feet to corner No. 3; thence N. ½ deg. E., 200 feet to corner No. 4; thence S. 89½ deg. W., 719 feet to the place of beginning, embracing $3\frac{30}{100}$ acres, which defendants believe include and embrace the premises described by plaintiff in his complaint, and which in said complaint is designated as the J. H. Russell lode. Defendants further say that at the time of said discovery and location the said premises, embraced in said location & described in said application for patent, were mineral lands of the United States, which were at the time unoccupied and unrepresented and subject to such location under the laws of the United States.

8 And they further allege that the said Mary A. Hoyt and her predecessor in interest has been in the quiet and peaceable possession of the said premises holding and claiming the same adversely to said plaintiff for more than four years before the commencement of this suit; and that neither the said plaintiff or any of his predecessors was or were possessed of said premises, or any part thereof, within four years before the commencement of this action. And said defendants further allege that at the time of the commencement of this suit, and for more than four years before that time, and from thence up to that time, the said Mary A. Hoyt had been in the quiet and peaceable possession and occupancy of the premises above herein and in said application for patent described; that said plaintiff has not any right, title, interest, or right of possession in or to said described premises or any part thereof; that plaintiff claims some right, title, interest, or right to possession of said premises, and claims that he is the owner thereof. Wherefore the defendants pray that said plaintiff may be restrained and

9 forbidden from setting up or making any claim to or upon the said premises; and that all such claims be quieted; and that by decree of this court the said Mary A. Hoyt may be declared and adjudged entitled to the possession and occupancy of said premises and the enjoyment thereof; and that said plaintiff's

claim may be declared void, and for costs expended by defendants in this behalf.

CHUMASORO & CHADWICK,
Defendants' Att'ys.

TERRITORY OF MONTANA, *Lewis & Clarke County:*

Mary A. Vestal, late Mary A. Hoyt, and John W. Gonn, being duly sworn each for himself and herself says: That they are the defendants in the above-entitled action, and that the matters stated in the foregoing answer are true of their own knowledge, except as to those matters therein stated on information and belief, and as to those matters they believe it to be true.

MARY A. VESTAL.
JOHN W. GONN.

Subscribed & sworn to before me, this 18th day of March, 1878.
C. E. EWING,
Notary Public.

10 And on the 4th day of November, A. D. 1879, said defendants, by leave of the court first had and obtained, filed herein their supplemental answer to said plaintiff's complaint, of which said supplemental answer, in words & figures, the following is a copy, to wit:

Supplemental Answer.

In the District Court, Third Judicial District, Lewis & Clarke County, Montana Territory.

JOSEPH H. RUSSELL *vs.* MARY A. HOYT & JOHN W. GONN.

Now come the defendants, and by leave of the court for that purpose first had and obtained, for supplemental answer to the complaint of plaintiff heretofore filed in this cause, allege, that since the institution of this suit and the filing of defendants' answer therein, the said plaintiff, during the period embraced between the first day of January, A. D. 1878, and the third day of January, A. D. 1879, failed to do and perform the necessary labor required by
11 the laws of the United States, or to make the required improvements under the laws of the United States upon the premises described in the complaint of said plaintiff, filed in this cause and called the J. H. Russell lode; whereby under the said laws of the United States the said premises described in said complaint became and were open to relocation in the same manner as if no location thereof had ever been made, and defendants allege that while the said premises so called the J. H. Russell lode were so open to relocation the defendant, John W. Gonn, to wit, on the third day of January, A. D. 1879, finding the same so open and subject to relocation, entered upon the said premises so claimed by said plaintiff as the J. H. Russell lode, and made a discovery of a vein of silver bearing ore or rock, and, on the said 3rd day of January, 1879, duly made a location of a silver quartz lode, in accord-

ance with the laws of Montana Territory and of the United States, by and under the name of the "Bilk Lode," and, on the 20th day of January, 1879, and within the time required by
12 law duly filed a notice of such location in the office of the county recorder of Lewis & Clarke county, Montana Territory; which said notice of location is in the words & figures following, to wit:

"Notice of relocation of the J. H. Russell lode to be hereafter known as the Bilk lode. Notice is hereby given that I, John W. Gonn, a citizen of the United States and a resident of Lewis & Clarke county, Montana Territory, have, this third day of January, A. D. 1879, relocated, under the mining laws of the United States and of Montana Territory, that certain lode known as the J. H. Russell lode, claimed by J. H. Russell and situated in what is known as the Ten-mile unorganized mining district, county of Lewis & Clarke, Territory of Montana, and in township 8 north of range 5 west from the principal meridian, said J. H. Russell lode to be hereafter known as the Bilk lode, the location of which said Bilk lode is so distinctly marked upon the ground that the boundaries can be readily traced; and, for a further description of surface ground, commencing at discovery and resuming southerly sixty feet to a post marked "A," thence northeasterly and overlapping the easterly end of the Mammoth lode 1,100 feet to a post marked
13 "B," northerly 1,100 feet to a post marked "C," southerly 1,100 feet to a post marked "D," southerly 50 feet to the place of beginning. Said J. H. Russell lode having, to my own knowledge, been forfeited by its former owner, Joseph H. Russell, on the ground that the said Jos. H. Russell has not expended upon said J. H. Russell lode in labor and improvements the amount required by the mining laws of the United States & of Montana Territory. The date of this location is the third day of January, A. D. 1879.

JOHN W. GONN.

TERRITORY OF MONTANA, }
County of Lewis & Clarke, } *ss:*

John W. Gonn, being duly sworn, says that he is the locator of the above lode; that said location is made in good faith, and the facts stated are true.

JOHN W. GONN.

O. B. TOTTEN, *Clerk.*

Filed for record Jan'y 20, 1879, at 5.30 o'clock p. m.

And the defendants further allege that the premises described in said notice of location cover and include a large portion of
14 what is claimed by said plaintiff as the J. H. Russell lode, and they further allege that said Gonn is owner of and entitled to the possession of the said premises so described in the said notice of location herein above set forth, and that the said plaintiff is not entitled to the possession of the same or any part thereof.

Wherefore the defendants demand judgment that plaintiff's claim

to the said premises described in the said notice of location hereinbefore set forth may be adjudged by the decree of this court to be invalid and of no effect, and that he may be perpetually enjoined and restrained from making or setting up any claim to or upon said premises, and that said claim be declared quieted, and that the defendant, John W. Gonn, be declared and adjudged the owner thereof and of right in the possession thereof and every part and portion thereof as against any claim of said plaintiff, and that he have judgment for costs and for such other and further relief as may be equitable.

CHUMASERO & CHADWICK,
Defendants' Attorneys.

15 TERRITORY OF MONTANA, *Lewis & Clarke County:*

John W. Gonn, being duly sworn, says that he is one of the defendants in the above certified cause; that he has heard the foregoing supplemental answer read, and that the matters therein stated are true of his own knowledge, except as to matters therein stated on information and belief, and as to such matters he believes it to be true.

JOHN W. GONN.

Subscribed and sworn to before me, this 25th day of October, A. D. 1879.

WM. CHUMASERO,
Notary Public.

And on the 31st day of January, A. D. 1880, said plaintiff filed herein his replication to defendants' said answer & supplemental answer; which said replication is in the words & figures following, ing, to wit:

Replication.

16 In the District Court, Third Judicial District, Lewis & Clarke County, Montana Territory.

JOSEPH H. RUSSELL, Plaintiff, *vs.* MARY A. HOYT *et al.*, Defendants.

Now comes the plaintiff, and for replication to the supplemental answer of the defendants herein, and denies that since the institution of this suit or that since the filing of defendants answer originally filed herein, or at any other time — this plaintiff failed to do the necessary labor required by the laws of the United States, or at any time failed to do the requisite amount of improvements upon said property. Denies that said property became or was forfeited, or became or was open to relocation, and denies that said Gonn ever at any time made a relocation thereof in accordance with law, or that he is or ever was the owner of any portion of the said J. H. Russell lode, claimed and owned by this plaintiff.

Wherefore, plaintiff prays judgment as in his complaint demanded.

17 E. W. & J. K. TOOLE,
Att'ys for Plaintiff.

TERRITORY OF MONTANA, *County of Lewis & Clarke*:

Joseph H. Russell makes oath and says: That he is the plaintiff herein; that he has heard the foregoing replication read, knows the contents thereof, and that the matters therein stated are true of his own knowledge, except as to such matters as are therein stated on information and belief, and as to those matters, he believes it to be true.

J. H. RUSSELL.

Subscribed and sworn to before me, this 8th day of December, A. D. 1879.

JAS. K. TOOLE,
Notary Public.

And that on the —— day of May, 1881, at the May term of said court, this cause duly came on for trial before the court and a jury.

Whereupon the plaintiff, to maintain the issues on his part
18 introduced the plaintiff as a witness, who testified that the J. H. Russell lode was discovered on the 27th July, 1867, by himself and one Bassett; that there was a wall rock on the S. E. side of the vein with rock in place; that they staked it by placing posts about 1,100 feet on each side of the shaft; that the claims were not staked except at each end of discovery claim; that the stakes were 3½ feet long and planted in the ground. On cross-examination witness stated that the stakes staid up about two years; that he had a survey made, but did not remember that the stakes were there then. That the quartz came up to top of ground, and that the shaft is now 30 feet deep. That the survey was made by Marsh, a deputy mineral surveyor, and that witness showed him where the lode was and discovery hole. That said stakes were firmly planted in the ground; were about four inches in diameter, about 3½ feet above the ground in heighth, and that on each stake were placed the name of the lode, the date of discovery, and names of the claimants, or locators and discoverers, and a record thereof made, and that
19 the original record has been lost for a long time; that *the* he has made diligent search for it, and it cannot be found, and that he does not know where it is, and cannot produce the same; that the vein of quartz or ore is about five feet wide; think stakes were placed with strike of the lode; I endeavored to do so.

MARSH testified: That he made survey, & surveyed the claim easterly through the Mammoth lode; that the surface ground was surveyed 52½ feet wide on each side of center of the vein; that there was a shaft on the vein 250 feet from discovery which he judged was on course of vein as shown at discovery; that he did not see any stakes; looked for them; that he made survey to correspond with course of lode according to his best judgment.

RUSSELL recalled, testified: That he staked the lode the way he supposed it to run, & afterwards discovered that the vein did not run as staked; that he did not remember whether he discovered the mistake before or after the location of the Mammoth lode; that he did not know how much the lode varied from the original location.

20 And plaintiff then called O. B. Totten, the county recorder

who introduced the record book in which was the location of the J. H. Russell lode, which was offered in evidence. The defendant objected to its introduction for the reason that the same was indefinite and did not state where the lode was or anything to designate it, and that it was not in accordance with the lines of the Marsh survey; and that it did not comply in any other respects with the requirements of the laws.

The court overruled the objection, and the defendants then and there excepted.

The said record was then read in evidence under objection of defendant, as is as follows:

J. H. Russell Lode.

This lode is situated one mile from Ten-mile creek and ¾ of a mile from Beaver creek, between the two streams, and on the northerly point of the "Red Mountain." It was discovered on the 21st of July, 1867, by S. T. Bassett and J. H. Russell, who claim 200 feet for their discovery; that is, the said Bassett, with J. H. Morrison and Wm. Coyne, claim the westerly 100 feet of discovery claim, and also claims Nos. one, two, and three westerly from discovery, and Charles Rumly claims No. four, and C. R. Stewart No. 5
21 westerly, and the said Russell claims the easterly half of discovery and No. one easterly, and Joe Flick No. 2, R. C. Ewing No. 3, H. C. Wilkinson No. 4, and T. F. Campbell No. five easterly from discovery; said claims consist of 200 feet each, and the parties whose names appear above claim and record as pre-emptors the several claims numbered and set opposite to their respective names."

J. H. Russell, being duly sworn, doth say: That all of the parties whose names appear as pre-emptors in the above-named lode are *bona fide* residents of this Territory.

JOSEPH H. RUSSELL.

Sworn to and subscribed before me, this 30th day of July, 1867.

R. C. EWING,
County Clerk.

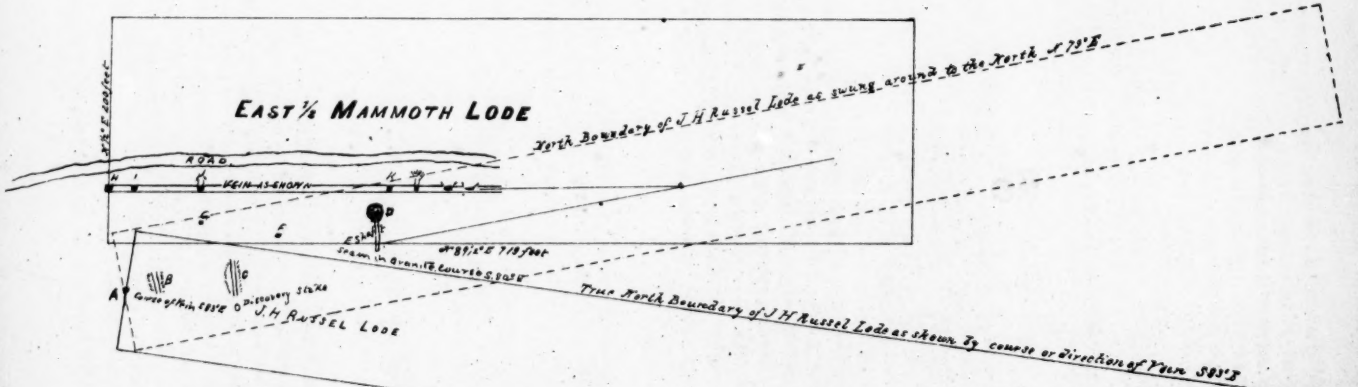
Filed for record at 6 o'clock p. m. on the 30th day of July, 1867.

R. C. EWING,
Co. Recorder.

J. T. Flick, called by plaintiff, testified that he helped Marsh make the survey as a chainman; that he saw the shaft at the west end of lode called discovery; there was another shaft about 200 feet east and several other cuts further east; that they found what
22 they supposed to be the center of the shaft, and measured 52½ feet on each side and then run the boundaries. Paid no attention to the quartz; there was considerable of a vein at discovery; think, in shaft, 250 ft. E., there was no water; can't say that I saw ore that was of a taley nature—decomposed granite; did not go into either shaft; 1st cut east of that about 100 feet, and another east of

Scale of Plat 60 feet to 1 inch.

0 100 200 300 400 500 600 700


EAST ½ MAMMOTH LODE
N 15° E 200 feet
ROAD
VEIN 45 FEET
North Boundary of J H Russel Lode as sworn around to the North of 75° E
N 89½° E 718 feet
Seam in Granite Course S 30° E
Course of Vein S 85° E
Discovery Stake
J.H. RUSSEL LODE
True North Boundary of J H Russel Lode as shown by course or direction of Vein S 85° E

EXPLANATIONS

A. Discovery Shaft J.H. Russel Lode (60')
B. Cut across alleged strike of vein (inf)
C " " " " " " (")
D " " " " " " (")
E. Shaft showing seam in Granite running S 30° E (60')
F. Hole or cut showing seam (inf)
G. " " " " " (")
H. Discovery Shaft Mammoth Lode (60')
I. Shaft on " " " (")
J. Cut showing " " (inf)
K " " " " (")
L Short Tunnel and Shaft " " (60')
M. N. Open cuts and work

No 433 Mayfield
" Russell } p 24

that; the corner of the vein was clearly disclosed; we surveyed fifty-two feet on each side of the vein. And said Marsh and Flick having testified to their survey and plat, said plat was introduced, and is as follows, to wit:

[Plat missing.—Cl'k.]

Here plaintiff closed.

23 Plaintiff was again recalled and produced specimens of ore, numbered 1, 2, 3. First, from discovery—galena; second was from the shaft, 250 feet east, and the third from cut 150 feet east of that.

Cross-examination:

The first specimen was obtained by me in 1878, the second was taken out last winter; don't recollect when the 3rd was got. I kept them in a box, at my house in box; box was nailed up. The galena was taken from near the Mammoth lode, when the same was worked.

The defendant then called as a witness George Foote, who testified that he was a civil engineer and surveyor since 1867 of mining claims—a deputy mineral surveyor, and had large experience in regard to quartz lodes; that he made a survey and plat of the premises, the J. H. Russel lode, as originally staked and claimed and as surveyed by Marsh, and, also, of the Mammoth lode, which plat was introduced in evidence and is as follows, to wit:

(Here follows diagram, marked p. 24.)

25 That the survey of the J. H. Russell lode, as shown on the plat, was made in accordance with the course of the vein; that the discovery stake was still there and that he saw the course of the vein; that there is no indication that the course of the J. H. Russell vein was, as it was surveyed by Marsh, represented by his plat; that he examined the discovery shaft of J. H. Russell; that it is a seam or strata of decomposed granite, not a lead, and no indications of quartz, only discolored granite. Saw the shaft 250 feet east; it is about 13 feet deep. The course of the seam is indicated by the red line on the plat parallel with discovery shaft. There were some holes in slide rock. The shaft as indicated in Marsh's survey is not correct. My plat is correct as to the location of shafts. The shaft marked B is 219 feet from the S. W. corner of the Mammoth lode and 10 feet south of the south boundary of Mammoth lode on Marsh's map. The east discovery stake of J. H. Russell lode is 53 feet south of the south line of the Mammoth lode. It is 31 feet south of the center of the location as made by Marsh. The J. H. Russell lode is 1,100 feet long. The blue line on my plat represents
26 the Mammoth lode as developed from the discovery shaft of J. H. Russell lode; it is 557 feet to the center line of intersection of the Mammoth lode as surveyed by Marsh. The letters

L M & N show the cuts on the Mammoth lode made from observation on the Mammoth lode. The developments show a very good body of galena and carbonate ore. I found native silver; there are cuts on the center line of the Marsh survey between shafts "A" & "E;" they do not show any indication of a lode; on the S. end of cut B there are some indications. Due east from the Russell discovery, I examined it in 1879. The cuts marked "B" & "C" are down to solid granite; have been sunk through loose material to the natural formation. Have examined the ore that came from Mammoth lode—galena and carbonate; have examined shaft "E" several times, in '77, '78, & '79. There was no ore on sides, ends, or bottom. On the dump there is something that, I think, resembles Russell's 2d specimen.

On cross-examination witness stated:

27 "Found the discovery stake on line of vein; stake was marked with pencil writing; was weather-beaten stones around and grass growing there—stones marked "J. H. Russell Lode;" had evidently stood there many years; there is nothing there to indicate course of vein but the discovery hole. I do not know anything about the original stakes of my own knowledge. I was only told by defendant Gonn that it was one of the original stakes; I do not know where it originally stood; can't say that it is where it was placed originally by Russell. I made survey as directed by defendant Gonn. I made the original survey of Mammoth lode; found rocks planted for corners, and followed those courses.

A. M. ESLER testified that he was a practical miner and assayer; had examined J. H. Russell lode as to its course—the way the vein ran. The vein is parrallel with the vein of the Mammoth lode; there was a hole 20 feet east where Mammoth vein expend-

28 had a stake 50 to 75 feet distant, and sighted across from discovery; examined the cuts from "A" to "E" on Foot's plat, at bottom of cuts was granite. There were no indications of any lode. I specially examined for such indications. The formation at Mammoth shaft does not run toward Russell lode, but distinctly towards Mammoth. Examined Russell discovery shaft; could see distinctly to bottom of shaft; there is only a stain or seam, not a lode—most distinctly nothing to indicate that it was Mammoth lode; the cuttings were deep enough to show whether there was a lode enough to indicate it if there was; the bottom was granite; the survey of Russell lode by Marsh, where it crosses the Mammoth, takes in developments of Mammoth. I took samples, fair samples, of the ore on Russell lode from three different holes, including the discovery; made assays from the samples of J. H. Russell lode, and nothing, neither of gold or silver, in them. At discovery it was hornblend. I made a general sample, a fair average of all. The location called Russell lode, I should call a bunch of quartz. There was not a lead. I cannot swear positively where

29 the J. H. Russell lode runs. I think it runs at a point opposite the cribbed shaft, 50 or 60 feet north of where Foote's survey line or plat shows it to be. A great deal of hornblend

in that district bears silver. Know nothing of original stakes, was never down in either shaft, only looked down. Cannot say that the specimens were not got out of shafts where Russell says he got them. Can't say whether the direction of the lode in bottom of or center of shafts shows it to run with Marsh's survey. Nor can I say how it appears in discovery or cribbed shaft, 200 feet east.

(Add same in substance to evidence of Perry & Foote.)

CHARLES PERRY testified: I know the lodes; took samples of J. H. Russell lode; examined it; am a miner. From the indications of developments of the Russell lode, it did not look favorable for a lode, there was no lead there; the samples I took I left at United States Assay office; they were taken from 5 or 6 different places; 10 or 12 pounds of rock in all were taken from discovery hole; from 2 or 3 places west, and also east, & from the cuts; received assayer's certificate. I took a fair sample from each hole, the best I could find; they were taken in October or November, 1879, from discovery
30 shaft of J. H. Russell lode; the indications —, from the way the rock is in place, it runs S. of E.; there is a stake a short distance from discovery, marked "J. H. Russell lode." If there is a lode the stake indicates the same course as indications at hole, and would run parallel with the Mammoth, and as it goes east would run further off from Mammoth. In the shaft east the material in it is decomposed granite. It did not indicate that it run towards Mammoth. Running east from discovery it would bear off south. Examined the cuts; I cleaned them out; was granite in the bottom; no indications of lode; was small seam, but no quartz. (Witness here examined the specimens of quartz produced by Russell.) There was nothing in the J. H. Russell lode that resembles the specimens numbered; the specimens are the same as the Mammoth ore; never saw anything in Russell lode that resembles them worked in Mammoth lode.

R. B. Harrison, assayor in charge of U. S. assay office, introduced certificate of assays made from samples left by Perry; the as-
31 says — made under my supervision, and are correct; yesterday I assayed the sample again, and found the same result, as shown in the certificate; I always keep part of every sample; I have made assays (six) with the same result, and found no gold or silver. The certificate was then read in evidence, and is as follows:

Assayor's Certificate.

32 HARPIN DAVIS testified: Am a miner; saw Russell location in 1868; saw it every year till 1874; was in discovery hole several times after 1874, when it was fifteen feet deep; saw material taken from it and saw it after taken out; nothing ever taken out but granite; there seemed to be some indications of a bunch of quartz; there were no indications of a lode; saw some cuts near shaft; were no indications of any vein; rock taken out was granite and some hornblende; I know the Mammoth lode; the ore resembles Russell's specimens; some of it carbonate.

ALEXANDER MCDONALD testified: I am a miner; worked in discovery shaft on J. H. Russell lode in 1874 & '5; when I quit work we were 18 or 19 feet deep; when I commenced, 10 or 12 feet; saw nothing that would indicate a lode; nothing I would call ore; nothing but burnt granite; it was not mineral-bearing rock.

J. H. FROST, miner, testified: Mined 20 years; know shaft and location of J. H. Russell lode; could discover nothing of any
33 vein matter east of discovery; no indication of a lode; bottom is granite; was in shaft east, in bottom nothing but granite; was a small seam on one side running in the direction of lines marked "G" & "F" on Foot's map; from all indications the same run parallel with Mammoth lode; saw 2 or three of the cuts; nothing in them but granite; one cut, to run up mountain, run in 8 or 10 feet in side rock; bottom granite; one near shaft like it; the next cut was 50 to 75 feet east; similar to 1st granite; no indications of lode; been there several times; last time a week ago.

ESSLER, recalled, testified: I took samples of ore from what is called J. H. Russell location (produces the samples); got them as I would in any case when I examined mine to purchase; the best of the sample is hornblende, from discovery; granite is from cuts east; none of it is ore; I saw no speck of galena on the line of the location at all; there is a crevice or seam in granite 4 or 5 feet wide; I do not assume to give exact direction of lode; only speak from observation; can't say where the specimens came from; was never down in shafts since the were at present depth; did not go
34 down when there few days ago. The specimens introduced by plaintiff were here examined by witness, who stated: "I saw that kind in the Mammoth; assayed the hornblende and found neither gold or silver in it; I looked over the dump in different places and could find no galena or anything different from the specimens I took."

DAVID H. GILMORE testified: "Have been quartz miner 25 years; knew Russell lode from fall of '69 to 1877; have been several times to the discovery shaft when 18 feet deep & examined it; I did not consider there was any lode or ledge—was granite and a bunch of bastard quartz mixed with hornblende. The direction of the seam at discovery shaft would run parallel to the Mammoth lode. If anything, would bear to the south; saw discovery stake. The seam or lay of the vein runs in same direction as indicated in Foot's survey. There is no indication of any lode running from Russell discovery to the Mammoth; it would be impossible for it to make the turn from the indications at discovery; the cuts E, F, G on Foot's
35 map show a small fissure of granite. The shaft "E" showed no ore whatever. I know the Mammoth ore. The specimens produced by Russell are exactly like the Mammoth ore; not at all like the stuff at Russell's shafts & cuts. One of the pieces is exactly like the "Free Speech" lode ore, and I believe it is.

Cross-examination:

When I first saw discovery hole it was about 2 feet deep; there was a small bunch of ore. Boyd was working in 75; it was then 18

feet deep; there were no indications of a lode; did not see what I would call wall. I judged the direction by the points on the rock. Found granite in Esler's specimens; there is nothing that looks like primitive granite; the granite shows streaks of lead matter, which you can get anywhere on that mountain. Have sunk down on such streaks there; I have done a great deal of work, tracing veins in that camp, running levels; some were 50, 30, 40, and 70 feet; some 120 feet; generally find in running levels that the vein corresponds with croppings or line on surface. The course of Mammoth vein is parallel with Russell; the Russell would bear to the south;
36 the course of the Mammoth is east & west. I do not consider there is any vein on Russell location. I was never down in the shafts; know nothing of the apparent direction of the J. H. Russell lode in them. The walls at surface may not give the true direction of the vein; a slight variation in a four or five feet shaft would throw the vein a great ways out of its true course. It is frequently the case that walls in 4 or 5 feet vary as much as a foot or two from actual course of vein; this may be from a jog of several feet in wall. Can't say where any of the specimens came from. The crevise in the J. H. Russell — 4 or 5 feet wide, I should judge, from looking down the shafts.

(Add same in substance to evidence of Harpin Davis.)

JOHN W. GONN testified: Am acquainted with Mammoth lode. Myself & E. M. Hoyt were discoverers. First saw Russell location in 1872, June. We looked at discovery hole. I lived 700 or 800 feet from lode; have done a good deal of work on the Mammoth lode.

The defendants here offered in evidence the original notice
37 of the location of the Mammoth lode, which is as follows, to wit:

Notice of Location.

"This lode is situated in the county of Lewis & Clarke and Territory of Montana, in Ten-mile mining district, on the east side of Ten-mile creek, about ¾ of a mile from said stream and ½ mile from Beaver creek, on the northwest side of the Red mountain, and 100 feet north of the J. H. Russell lode, and for a description of the surface ground of said claim: Commencing at a stake marked "A," which is 150 feet northwesterly from the center of discovery hole on a line drawn at right angles with the general apparent course of said lode, running the northeasterly along the northerly side line parallel to the general apparent course of said lode, to a stake marked "E," 750 feet from said stake A; thence southeasterly along the easterly end line at right angles with the northerly side line 200 feet to a stake marked D; thence southwesterly 1500 feet along the southerly south line parallel to the northerly side line to a stake marked C; thence northwesterly along the westerly end line parallel to the easterly end line to a stake marked B, a distance of 200 feet;
38 thence northeasterly along the northerly side line to the place of beginning. Discovered May 13, 1873, by John W. Gonn and

E. M. Hoyt. John W. Gonn and Mrs. Mary Hoyt claim 750 linear feet northeast from the center of discovery hole, and E. M. Hoyt, T. Hoyt, & A. M. Esler claim 750 linear feet southwest from the center of discovery hole, making 1500 feet along the line of said lode, together with 150 feet on the north side and 50 feet on the south side thereof for working purposes; together with all the dips, spurs, and angles or other lodes found on the surface and within the limits of the surface ground above described.

TERRITORY OF MONTANA, *County of Lewis & Clarke:*

E. M. HOYT, being duly sworn, deposes and says: That each of the above-named locators are citizens of the United States and *bona fide* residents of Montana Territory.

E. M. HOYT.

Subscribed and sworn to before me, this 29th day of May, A. D. 1873.

CHAS. F. ELLIS,
Co. Clerk.

39 Filed & recorded May 29, 1873, at 2 o'clock p. m.
CHAS. F. ELLIS,
Co. Recorder.

The plaintiff objected to its introduction for the reason that the affidavit sworn to was not in accordance with the requirements of law, and because the ground was not described by natural objects or permanent monuments so as that it could be identified by the record.

The court sustained the objection and refused to permit the same to be introduced and read in evidence; to which ruling of the court the defendant then and there excepted.

During the trial the court signed the following bill of exceptions:

In the District Court, 3rd Judicial District, Lewis & Clarke County, Montana Territory.

JOSEPH H. RUSSELL *vs.* MARY A. HOYT *et al.*

Be it remembered, that on the —— day of May, A. D. 1881, upon the trial of the above-entitled action to a jury, the plaintiff first having established the loss of the original, offered in evidence
40 record book "C" of lodes of the records of Lewis & Clarke county, M. T., in which was the record of the location notice of the J. H. Russell lode claim, and for the purpose of establishing plaintiff's title to said lode claim, which said record of location is in words & figures as follows, to wit:

(Which see at page — of this transcript.)

To the introduction of which the defendant objected, for the reason that the same was indefinite & did not state where the lode was situated, or anything to designate it or identify it as the property in question, and that it did not comply with the requirements of the

laws; which objection was by the court overruled, and the defendant then and there duly excepted.

The defendant offered in evidence the original notice of location of the Mammoth lode, which included the ground in question for the purpose of establishing defendants' title thereto, which notice is as follows:

(Which see at page — of this record.)

To the introduction of which the plaintiff objected, for the reason that the affidavit to said notice was not in accordance with
41 the requirements of the law; which objection was sustained by the court, and refused to permit the same to be introduced and read in evidence. To which ruling of the court the defendant then & there duly excepted.

For the purpose of showing that no mineral bearing lead, lode, or ledge existed at what is known as discovery shaft on the J. H. Russell lode claim, and that no such lead, lode, or ledge existed or extended from discovery shaft on the J. H. Russell lode claim in the direction claimed by plaintiff and into the ground in question, the defendant introduced several witnesses, to wit, Esler, Harrison, Davis, & others, who gave testimony of the non-mineral character of the rock and quartz taken out of the discovery shaft cross-cuts on the line of the so-called J. H. Russell lode, which said testimony had a tendency to show that the rock contained in the J. H. Russell lode claim was non-mineral in character. On motion of plaintiff's attorney the court struck out and excluded from the consideration all such evidence in regard to the character and value of the ores and rock as testified to by said witnesses.

42 To which ruling of the court in excluding said evidence the defendant then and there duly excepted.

For the purpose of showing that defendant had held the actual, exclusive, and the uninterrupted adverse possession of the lode in question for the statutory period, the defendant asked the witness Gonn (who had been duly sworn) the following question, to wit: "State, if you know, who has had the actual, exclusive, and uninterrupted possession of the ground in question from May 13, 1872, up to the time of the commencement of this suit. To the introduction of such evidence the plaintiff objected, and therefore objected to said question, which objection was sustained by the court, and all evidence relative to the possession of the ground in question by defendant was excluded by the court. To which ruling of the court the defendant then & there excepted.

The defendant offered in evidence tending to show that the Mammoth lode claimed by defendant was a large, well-defined lode or lead, bearing valuable rock and quartz, rich in silver, with well-defined walls, continuing from discovery shaft on the Mammoth lode and extending easterly across the ground claimed by plain-
43 tiff, and that such Mammoth lode was and is a separate and distinct lode or lead from that claimed by plaintiff as the J. H. Russell lode or lead.

To the introduction of which evidence plaintiff objected for the

reason that the same is irrelevant and immaterial, and the court sustained such objection and excluded said evidence, to which ruling of the court the defendant- then and there duly excepted.

The plaintiff then asked the court to give the jury the following instruction, to wit:

Plaintiff's Instruction.

"The title, possession, and right of possession of plaintiff to the property in question, prior to any claim made thereto by defendants as alleged in the complaint, not being denied by the answer, and defendants having failed to show any valid location thereof since said date or any abandonment or forfeiture thereof prior to their attempted location thereof, you will find for the plaintiff.

Given.

Which was given by the court.

To the giving of said instruction the defendant then & there duly excepted.

44 The defendants then asked the court to give the following instructions numbered 1 to 13, viz.:

Defendants' Instructions.

1.

The jury are instructed on the part of defendant- that under the laws of Montana Territory in force at the time the plaintiff claims to have located the J. H. Russell lode in ——, 1877, any person was entitled to locate a quartz lead, lode, or ledge by complying with the provisions of the act of 1864, which required: 1st, a record to be made, and before such record could legally be made it was required that a lead or ledge of gold or silver should first be discovered with a vein or crevice of quartz or ore, with at least one well-defined wall. This law absolutely required that the discovery must be on a gold or silver lode, and consequently that it is not sufficient merely to show that quartz or ore was found which is entirely barren or valueless in gold and silver.

The object of the law was to develop the precious mineral resources of the Territory & not to enable a person to take up

45 land which contained none of the precious metals. That law also required that the claim should be staked as well as recorded, and that the stakes should be renewed at least once in twelve months if torn down or otherwise destroyed. It also required the discoverer or pre-emptor to deposit in the recorder's office a specimen of the ore or mineral taken from such lode. All of these were necessary in order to entitle any person to claim or hold a quartz lode. The law of 1866 of the United States recognized all the requirements and no location could be of any validity without a compliance with them, and in order to entitle the plaintiff to recover in this case the jury must believe from the evidence that such requirements of the law have been complied with by the plaintiff or those who preceded & from whom he claims title.

If, then, the jury believe from the evidence that Russell, the plaintiff, on the —— day of ———, 1867, made a record of a location of what he called a lode, and that he had not, at the time of such record, discovered a vein, lead, lode, or ledge of gold or silver,
46 or that the stakes, if any, placed at each extremity of the lode, were torn down, and not replaced once in twelve months, they will find for defendant. And the jury are further instructed that a failure by the plaintiff, on whom the burden of proof rests, to establish by competent evidence any material fact required to be proven to maintain and establish his case, justifies the jury in finding that such matters are not true, and they are bound to so find.

2.

A mining claim, whether located under the mining acts of 1866 as well as under the mining act of 1872, should be laid along the same lengthwise of the course of its apex at or near the surface, and if it is not so located the location will only secure so much of the lode or vein as it actually covers.

3.

If a location be made crosswise of a lode or vein, so that its greatest length crosses the same instead of following the course thereof, it will secure only so much of the vein as it actually covers at
47 the surface, and the side lines of the location, which were fixed by law a distance of 50 feet on each side of the vein, become the end lines thereof, for the purpose of defining the rights of the owners.

4.

It was not the intent of the law to allow a person to make his location crosswise of a vein so that the side lines should cross it, and thereby give him the right to follow the strike of the vein outside of his side lines; that would subvert the whole purpose of the law. If he does locate his claim that way his rights must be subordinated to the rights of those who have properly located on the vein or lode. His right to the lode only extends to so much as his side lines cover.

5.

In making a location since the acts of Congress providing for surface ground for working purposes in connection with a claim, the notice of location must state the dimensions of surface ground and its direction, and the record must also describe it, and the boundaries are required to be distinctly marked on the surface, so as
48 to be readily traced, and the record thereof is required to contain such a description of the claim located by reference to some natural object or permanent monument as to identify the claim.

6.

In making a survey for a patent or adverse claim the duty of the

surveyor is to survey the same in accordance with the course of the line of location actually made and as shown by the stakes and notice and record of location; any material departure therefrom renders a survey void, and cannot affect any rights acquired by others who have subsequently located claims outside of such original claim as evidenced by the stakes and record, and who have complied with the laws in force.

7.

Under the requirements of the mining law on all claims located prior to the 10th day of May, 1872, ten dollars' worth of labor was required to be done by the 10th day of June, 1874, & each year thereafter, for each one hundred feet in length along the vein until a patent should be issued, and upon a failure to comply with
49 those conditions the claim or mine upon which such failure occurred was and is declared subject to relocation in the same manner as if no location had ever been made: Provided, The original locators, their heirs, assigns, or legal representatives had not resumed work upon the claim after failure and before relocation. And if the jury believe from the evidence that at the time the lode of defendants was located by him the plaintiff had not performed the labor required by the mining law aforesaid, they will find for the defendant.

(8.)

If the jury believe from the evidence or the admissions of the pleadings that the defendants and their predecessors, on the 13th May, 1873, made a discovery of a vein or lode of quartz or ore carrying precious metals, gold or silver, or other valuable minerals, and made a location thereon according to the requirements of the laws of the United States and of this Territory, and named the same the Mammoth lode, and that the said lode is the one described in defendants' answer and in controversy in this suit,
50 and that they made a record thereof on the 29th day of May, in compliance with the laws on that subject; that at the time of such location the same was upon the public lands of the United States, and was open to exploration under the mineral laws of the United States, then they will find for defendant.

(9.)

If the jury believe from the evidence that the defendants or their predecessors in interest, on the 13th day of May, 1873, entered into the possession of the ground in controversy, & which is called the Mammoth lode in defendants' answer, and located and recorded the location, as required by law, and that for three years prior to the commencement of this action they have been in such possession, holding the said premises adversely to said plaintiff during said time, they will find for the defendant.

10.

The vein of ore is the principal thing. The surface ground is but

an incident; and while the law provides no means of locat-
51 ing a vein except by defining a surface claim, the vein located must be determined in reference to the line of the surface claim.

11.

A party locating a mining claim, whether under the law of 1866 or of 1872, is required to make the same correspond with the course of the vein, and he has not the right to follow the vein in whatever direction the same may run. Where surface ground is provided for and surface ground is located the claim is confined to the lode entirely within such surface, when it covers the same & cannot be followed beyond.

(12.)

The burden of proof is on the plaintiff, and he is bound to make out his case by a preponderance of evidence.

13.

If the jury believe from the evidence that a witness has knowingly sworn falsely in any important or material particular, they are at liberty to disregard and discredit his entire testimony.

The foregoing instructions were refused.

52 To which refusal the defendants at the time objected and save an exception, and also saved an exception to the giving of the instruction asked by plaintiff.

D. S. WADE, *Judge.*

But the court refused to so instruct the jury, or to give any or either of said instructions.

To which ruling of the court the defendant- then & there duly excepted.

The foregoing, with amendments allowed, is correct.

May 27, 1881. D. S. WADE, *Judge.*

The court struck out & excluded from the consideration of the jury all the evidence in regard to the character and value of the ore or rock, testified to as having been taken from the J. H. Russell lode, said evidence being objected to when offered, because there was no such issue in the pleading.

The above was all the evidence in the case.

The cause was then submitted to the jury, who retired to consider of their verdict, and subsequently returned into court the
53 following verdict, viz:

Verdict.

In the District Court, 3rd Judicial District, Lewis & Clarke County, Montana Territory.

JOSEPH H. RUSSELL *vs.* MARY A. HOYT *et al.*

We, the jury in the above-entitled cause, find for the plaintiff.

N. H. WEBSTER, *Foreman.*

And afterwards, to wit, on the — day of May, 1881, the court signed and made the following decree and judgment, which were duly entered and which are as follows, viz:

Decree and Judgment.

JOSEPH H. RUSSELL *vs.* MARY A. HOYT *et al.*

Be it remembered that this case coming on regularly for trial upon the issues joined herein, and the same being submitted to a jury, and the evidence having been concluded, and said jury
54 being instructed by the court, returned a verdict, after having considered of the same, in favor of said plaintiff, and against said defendants, which said verdict was & is hereby adopted by the court.

It is, therefore, ordered, adjudged, and decreed that said plaintiff be, and he is hereby, declared and adjudged to be the owner of, possessed and entitled to the possession of, the said J. H. Russell lode claim, situate and being in Ten-mile mining district, in the county of Lewis & Clarke & Territory of Montana, and particularly that portion thereof described as follows, to wit: Beginning at the N. W. corner of said lode, thence N. 79° east $735\frac{8}{10}$ feet; thence south 0° 30″ W. 107 feet; thence S. 79° W. $190\frac{1}{2}$ feet; thence S. 89° 30″ W. $528\frac{3}{10}$ feet; thence N. 11° W. 10 feet—embracing an area of one $\frac{17}{100}$ acres; the said lode being a quartz lode of silver-bearing ore or rock, and known as lot No. 77, township 8 N. of range 5 west, as will appear by the pleading herein. That the said claim of said defendant to said portion of said J. H. Russell lode claims be, and the same is hereby, adjudged and declared invalid, & a cloud upon the title and right of possession of plaintiff, and he was at the date in said pleading mentioned and still is the owner, possessor, and en-
55 titled to the possession of the lot, piece, or parcel of land.

It is further ordered and adjudged that plaintiff recover of defendant his cost and disbursements in this behalf expended, taxed at four hundred twenty-four $\frac{60}{100}$ dollars, and that the proper process & execution issue herein.

Given under my hand & seal, this 24th day of May, A. D. 1881.

DECIUS S. WADE, [SEAL.]
Judge 3rd Dis't, M. T.

And thereupon the defendant, on the 28th day of May, 1881, served on the attorneys of plaintiff and filed their notice of intention to move for a new trial, which notice is in the words & figures following, to wit:

In the District Court, 3rd Judicial District, Lewis & Clarke County, Montana Territory.

JOSEPH H. RUSSELL *vs.* MARY A. HOYT, *et al.*

You will take notice that the defendants intend to move the court for a new trial in the above-entitled action upon the
56 following grounds:

1. Insufficiency of the evidence to justify the verdict, and that it is against law.

a. The evidence did not show that there was a lead or lode containing gold & silver, called the J. H. Russell lode.

b. The evidence showed that the Russell lode was not surveyed as the same was staked and recorded by plaintiff.

c. The evidence showed that the Russell lode and Mammoth lode were distinct and separate lodes; and that the surface ground to which plaintiff was entitled under his location did not include any part of the Mammoth location.

2. Errors in law occurring at the trial and excepted to by defendant-.

a. The court erred in admitting in evidence the record of the location of the so-called J. H. Russell lode.

b. The court erred in excluding the notice of location and the record thereof of the Mammoth lode.

c. The court erred in striking out the evidence in regard to the value of the J. H. Russell vein.

d. The court erred in giving the instructions, and each one
57 of them asked for by the plaintiff, and which are respectively numbered 1.

e. The court erred in refusing to give each one of defendants instructions, numbered, respectively, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, & 13; and that the motion will be made on bill of exceptions and statement of case.

CHUMASERO & CHADWICK, &
PORTER & BULLARD,
Def'ts' Att'ys.

To J. H. Russell, pl'ff; E. W. Toole, his attorney.

Assignment of Errors.

1. The court erred in admitting & receiving in evidence the record of the location of the J. H. Russell lode for the reason stated in the bill of exceptions & statement.

2. The court erred in refusing to allow defendant to introduce in evidence, and prove the notice of location and record thereof, of the Mammoth lode.

3. The court erred in giving the plaintiff's instruction number 1.

4. The court erred in refusing defendants' 1st instruction.

58 5. The court erred in refusing defendants' 2nd instruction.

6. The court erred in refusing defendants' third instruction.

7. The court [erred] in refusing def's' 4th instruction.

8. The court erred in refusing defendants' fifth instruction.

9. The court erred in refusing defendants' sixth instruction.

10. The court erred in refusing defendants' seventh instruction.

11. The court erred in refusing defendants' eighth instruction.

12. The court erred in refusing defendants' ninth instruction.

13. The court erred in refusing defendants' tenth instruction.

14. The court erred in refusing defendants' eleventh instruction.

15. The court erred in refusing defendants' twelfth instruction.

16. The court erred in refusing defend'ts' thirteenth instruction.

The foregoing statement is correct.

D. S. WADE, *Judge.*

May 30th, 1881.

59 And the said cause coming on to be heard upon defendants' motion and statement on motion for a new trial, on consideration it is ordered by the court that said motion be overruled; to which ruling of the court the defendants, by their attorneys, then and there duly excepted, and thereupon filed their bill of exception in words & figures following, to wit:

Def'ts' Exception.

In the District Court, 3rd Judicial District, Lewis & Clarke County, Montana Territory.

JOSEPH H. RUSSELL *vs.* MARY HOYT *et al.*

And now come the defendants and except to the ruling of the court on defendants' motion for a new trial in overruling the same, and asks the court to sign this bill of exceptions, which is done this 30th day of May, 1881.

D. S. WADE, *Judge.*

60 And on the 6th day of June, A. D. 1881, the said defendants filed herein *therein* their undertaking on appeal to the supreme court of Montana Territory, of which said undertaking, in words & figures, the following is a copy, to wit:

Undertaking on Appeal.

In the District Court of the 3rd Jud. District of the Territory of Montana in & for the Co. of Lewis & Clarke.

JOSEPH H. RUSSELL, Plaintiff, *vs.* MARY A. HOYT *et al.*, Defendants.

Whereas the defendants in the above-entitled action are about to appeal to the supreme court of the Territory of Montana from a judgment made and entered against them in said action, in the said district court, in favor of the plaintiff in said action, on the — day of May, A. D. 1881, for four hundred and twenty-four dollars and sixty cents, costs of suit: Now, therefore, in consideration of the premises & of such appeal, we, the undersigned, Robert C. Wallace &
61 Charles Lehman, of the county of Lewis & Clarke, Montana Territory, do hereby jointly & severally undertake and promise, on the part of the appellant, that the said appellant will prosecute his appeal with effect, and will pay all damages and costs which may be awarded against them on the trial of the appeal, or on a dismissal thereof, not exceeding three hundred dollars; to which amount we acknowledge ourselves jointly & severally bound;

And whereas the appellants are desirous of staying the execution of the said judgment so appealed from, we do further, in consideration thereof and of the premises, jointly and severally undertake

and promise, and do acknowledge ourselves further jointly and severally bound, in the further sum of eight hundred & fifty-nine dollars & twenty cents, being double the amount named in the said judgment, that if the said judgment appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the appellants will pay to said plaintiff the amount directed to be paid by the judgment or order, or the part of such amount, as to which the same shall be affirmed, if affirmed only in part, and all damages and costs
62 which may be awarded against the appellant- upon the appeal.

Dated this 6th day of June, A. D. 1881.

ROB'T C. WALLACE. [SEAL.]
CHARLES LEHMAN. [SEAL.]

TERRITORY OF MONTANA, } ss:
County of Lewis & Clarke, }

Robert C. Wallace & Chas. Lehman, the persons named in & who subscribed the foreging undertaking as the sureties thereto, being severally duly sworn, each for himself, says that he is worth the amounts specified in said undertaking, as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution, and that he is a resident and freeholder within the Territory of Montana.

ROB'T C. WALLACE.
CHARLES LEHMAN.

Subscribed & sworn to before me, this 6th day of June, A. D. 1881.

J. B. PORTER,
Notary Public.

63 And on the 16th day of June, A. D. 1881, said defendants filed herein their notice of appeal in words & figures following, to wit:

Notice of Appeal.

Title of Cause.

You will please take notice that the defendant- in the above-entitled action hereby appeals to the supreme court of this Territory from the order of the court overruling defendants' motion for a new trial and from the judgment therein made and entered in the said district court on the — day of May, 1881, in favor of the plaintiff in said action and against said defendant-, & from the whole thereof.

Dated the 14th day of June, 1881.

Yours, &c., CHUMASERO & CHADWICK,
Att'ys for Defendant-.

To the clerk of said district court, & Toole & Toole, att'ys for plaintiff.

The service & receipt of a copy hereof admitted after filing, this 16th day of June, 1881.

C. W. TOOLE,
Att'y for Plaintiff.

64 In the District Court, 3rd Judicial District, Lewis & Clarke County, Montana Territory.

JOSEPH H. RUSSELL, Plaintiff and Respondent,
vs.
MARY A. HOYT *et al.*, Def'ts & Appellants.

I, A. H. Beattie, clerk of said district court, do hereby certify that the foregoing seventy pages, numbered from 1 to 70 inclusive, contain a full, true, & correct transcript of certain pleadings, records, and proceedings filed, made, and had in said court in the above-entitled action as the same remain on file and of record in my office.

In witness whereof, I have hereunto set my hand and affixed my official seal the 13th day of June, A. D. 1881.

[SEAL OF DIS'T C'T.] ALEX. H. BEATTIE, *Clerk.*

65 In the Supreme Court, Montana Territory. January Term, 1882.

JOSEPH H. RUSSELL, Respondent,
vs.
MARY A. HOYT *et al.*, Appellants.

In the present term of January, A. D. 1882, of said supreme court the above-entitled cause was brought into said court by virtue of an appeal from the judgment and decree of the district court made & entered therein on the 24th day of May, A. D. 1881, agreeably to the statute of said Territory & the rules of said supreme court in such case made & provided, and was argued by counsel.

And afterwards, to wit, on the second day of February, 1882, that being one of the days of said January term of said court, this cause came regularly on for the decision and judgment of the court on appeal. Whereupon the court delivered its opinion and rendered its decision in writing, of which in words & figures the following is a copy, to wit:

66 *Opinion of the Court.*

In the Supreme Court, Montana Territory. January Term, 1882.

JOSEPH H. RUSSELL, Plaintiff & Respondent,
vs.
MARY A. HOYT *et al.*, Defendant- & Appellants.

Appeal from 3rd jud. district, Lewis & Clarke county.

By WADE, *Chief Justice:*

Plaintiff claiming by virtue of his location of the J. H. Russell lode situate in the Ten-mile mining district, Lewis and Clarke county, and having filed his protest and adverse claim to the application of the defendants for a patent to the Mammoth location, brings this action to have determined the right of possession to the ground in dispute. The plaintiff's location was made in July, 1867, under the law of 1864, and answers all the requirements of that law,

There was no issue in the pleadings as to a discovery upon this location, and all testimony upon that subject was properly excluded from the jury.

67 The defendants base their right to the Mammoth lode upon a notice of location recorded on the 29th day of May, 1873. To this notice there is an affidavit attached stating that the locators are citizens of the United States and of the Territory, but the matters and things contained in the notice or declaratory statement are not sworn to. On the trial the plaintiff objected to the introduction of this notice and declaratory statement in evidence, which objection was sustained, and upon this action of the court the defendants assign error.

On the 8th day of May, 1873, twenty days before the Mammoth location was made and recorded, the following act of the Legislature has approved and became a law: "Any person or persons who shall hereafter discover any mining claim upon any vein or lode bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposit shall, within twenty days thereafter make and file for record in the office of the recorder of the county in which said discovery is made a declaratory statement thereof in writing, on oath, before some person authorized by law to administer oaths, describing such

68 claim in the manner provided by the laws of the United States," which act took effect and was in force from and after its passage.

The following act was in force at the date of the passage and approval of the foregoing: "All acts and joint resolutions which declare that they take effect from and after their passage and approval by the Governor are hereby declared to take effect only at the seat of government, and in other portions of the Territory allowing fifteen miles from the seat of government for each day."

The act of May 8, 1873, was enacted & became a law at a session of the Legislative Assembly at Virginia City, then the seat of Government of the Territory, and appellants contend that the court ought to have taken judicial notice of the place where the Mammoth lode was located and its distance from the seat of Territorial government, and that by such notice & without proof to have determined and declared that the Mammoth location was so far distant from the capitol of the Territory as that the act of May

69 8, was not in force as to it at the time the same was made and recorded on the 29th of May, 1873.

Courts will take judicial notice of what is generally known within the limits of their jurisdiction; of the divisions of a State or Territory into towns or counties; of the leading geographical features of the land; of the position of important cities and towns, and of government surveys of the public lands; but we are not aware of any principle or authority that would authorize or require a court to take judicial notice of the place where mere private property is situated, or its distance from the seat of government of the political division within which it is situated. Only matters of public importance and notoriety are within the scope of what courts will take judicial notice of.

Matters of mere private concern, as the location or situation of a farm or a mining claim, or their distance from the seat of government, are not within the operation of the principle.

The act of May 8, 1873, was by its terms in force from and after its passage. If the defendants were within the exception they
70 ought to have made that fact to appear by proof.

The objection to the introduction of the declaratory statement of the location of the Mammoth claim was properly sustained. The defendants, basing their rights upon this declaratory statement, they had no standing in court without it.

Possession without a valid location could not affect the rights of plaintiff. The right of possession comes only from a valid location. A location is not valid without a declaratory statement on oath. Without such a location the defendants could not question the plaintiff's right in the premises.

The objection that there was no replication to the answer cannot be raised for the first time in this court. If a replication had been necessary the question ought to have been raised in the court below, where the same might have been supplied.

The judgment is affirmed with costs.

D. S. WADE,
Chief Justice.
E. J. CONGER,
Assc. Justice.

Thereupon judgment on appeal was entered in the words & figures following, to wit:

71 In Supreme Court Montana Territory. January Term, 1882.

In the present term of January, A. D. 1882, of this supreme court the cause between Joseph H. Russell, respondent, and Mary A. Hoyt and John W. Gonn, appellants, came regularly on for decision and judgment on appeal; and said cause having been heard and considered by the court on the transcript of the record of the court below, it is ordered and adjudged by the court here that the judgment and decree of the court below, entered in said cause on the 24th day of May, 1881, be, and the same is hereby, affirmed, with costs. And it is further ordered that said respondent, Joseph H. Russell, recover against said appellants, Mary A. Hoyt *et al.*, ——— dollars for his costs herein expended, and have execution therefor.

2nd February, 1882.

And on the 16th day of September, A. D. 1882, the said appellants filed herein their writ of error to remove said cause to the Supreme Court of the United States, of which said writ the following is a copy:

72 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the Territory of Montana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, which is in the said supreme court, before you, in a

suit between Joseph H. Russell, plaintiff, and Mary A. Hoyt (now Mary A. Vestel) and John W. Gonn, defendants, a manifest error has happened, to the great damage of the said Mary A. Hoyt, now Mary A. Vestel, & John W. Gonn, as by their complaint appears, we being willing that error, if any hath been committed, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next in the said Supreme Court to be then and there
73 held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable M. R. Waite, Chief Justice of the said Supreme Court [of the United States,] the 16th day of September, in the year of our Lord one thousand eight hundred and eighty-two.
[Seal of Sup. Court, M. T.]

ISAAC R. ALDEN,
Clerk of the Supreme Court, Montana Territory.

Allowed.
DECIUS S. WADE,
Chief Justice of the Territory of Montana.

And on the same day, to wit, the 16th day of September, 1882, said defendants filed herein their undertaking, to accompany said writ of error, of which said undertaking, in words and figures, the following is a copy, to wit:

74 *Undertaking.*

Know all men by these presents that we, William Muth and William Davenport, of Helena, Lewis and Clarke county, Montana Territory, are held and firmly bound unto Joseph H. Russell in the sum of five hundred dollars, lawful money of the United States of America, to be paid to the said Joseph H. Russel, his executors, administrators, or assigns; for which payment, well and truly to be made, we bind ourselvess, our heirs, executors, and administrators, jointly and severally, firmly by thesese presents.

Sealed with our seals and dated the 16th day of September, one thousand eight hundred and eighty-two.

Whereas lately, at a supreme court in and for the Territory of Montana, in a suit depending in said court between Joseph H. Russell, plaintiff, and Mary A. Hoyt, now Mary A. Vestel, and John W. Gonn, defendants, judgment was rendered against the said Mary A. Hoyt, now Mary A. Vestel, and the said John W. Gonn, defendants, and the said defendants having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to
75 reverse the judgment in the aforesaid suit, and a citation di-

Matters of mere private concern, as the location or situation of a farm or a mining claim, or their distance from the seat of government, are not within the operation of the principle.

The act of May 8, 1873, was by its terms in force from and after its passage. If the defendants were within the exception they
70 ought to have made that fact to appear by proof.

The objection to the introduction of the declaratory statement of the location of the Mammoth claim was properly sustained. The defendants, basing their rights upon this declaratory statement, they had no standing in court without it.

Possession without a valid location could not affect the rights of plaintiff. The right of possession comes only from a valid location. A location is not valid without a declaratory statement on oath. Without such a location the defendants could not question the plaintiff's right in the premises.

The objection that there was no replication to the answer cannot be raised for the first time in this court. If a replication had been necessary the question ought to have been raised in the court below, where the same might have been supplied.

The judgment is affirmed with costs.

D. S. WADE,
Chief Justice.
E. J. CONGER,
Assc. Justice.

Thereupon judgment on appeal was entered in the words & figures following, to wit:

71 In Supreme Court Montana Territory. January Term, 1882.

In the present term of January, A. D. 1882, of this supreme court the cause between Joseph H. Russell, respondent, and Mary A. Hoyt and John W. Gonn, appellants, came regularly on for decision and judgment on appeal; and said cause having been heard and considered by the court on the transcript of the record of the court below, it is ordered and adjudged by the court here that the judgment and decree of the court below, entered in said cause on the 24th day of May, 1881, be, and the same is hereby, affirmed, with costs. And it is further ordered that said respondent, Joseph H. Russell, recover against said appellants, Mary A. Hoyt *et al.*, ——— dollars for his costs herein expended, and have execution therefor.

2nd February, 1882.

And on the 16th day of September, A. D. 1882, the said appellants filed herein their writ of error to remove said cause to the Supreme Court of the United States, of which said writ the following is a copy:

72 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the Territory of Montana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, which is in the said supreme court, before you, in a

suit between Joseph H. Russell, plaintiff, and Mary A. Hoyt (now Mary A. Vestel) and John W. Gonn, defendants, a manifest error has happened, to the great damage of the said Mary A. Hoyt, now Mary A. Vestel, & John W. Gonn, as by their complaint appears, we being willing that error, if any hath been committed, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next in the said Supreme Court to be then and there
73 held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable M. R. Waite, Chief Justice of the said Supreme Court [of the United States,] the 16th day of September, in the year of our Lord one thousand eight hundred and eighty-two.

[Seal of Sup. Court, M. T.]

ISAAC R. ALDEN,
Clerk of the Supreme Court, Montana Territory.

Allowed.

DECIUS S. WADE,
Chief Justice of the Territory of Montana.

And on the same day, to wit, the 16th day of September, 1882, said defendants filed herein their undertaking, to accompany said writ of error, of which said undertaking, in words and figures, the following is a copy, to wit:

74 *Undertaking.*

Know all men by these presents that we, William Muth and William Davenport, of Helena, Lewis and Clarke county, Montana Territory, are held and firmly bound unto Joseph H. Russell in the sum of five hundred dollars, lawful money of the United States of America, to be paid to the said Joseph H. Russel, his executors, administrators, or assigns; for which payment, well and truly to be made, we bind ourselvess, our heirs, executors, and administrators, jointly and severally, firmly by thesese presents.

Sealed with our seals and dated the 16th day of September, one thousand eight hundred and eighty-two.

Whereas lately, at a supreme court in and for the Territory of Montana, in a suit depending in said court between Joseph H. Russell, plaintiff, and Mary A. Hoyt, now Mary A. Vestel, and John W. Gonn, defendants, judgment was rendered against the said Mary A. Hoyt, now Mary A. Vestel, and the said John W. Gonn, defendants, and the said defendants having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to
75 reverse the judgment in the aforesaid suit, and a citation di-

rected to the said Joseph H. Russell, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said defendants above named shall prosecute said writ of error to effect and answer all damages and costs if they should fail to make their plea good, then the above obligation to be void; otherwise, to remain in full force and virtue.

WM. MUTH. [SEAL.]
WM. DAVENPORT. [SEAL.]

Approved by—
DECIUS S. WADE,
Chief Justice of Supreme Court of Montana Territory.

TERRITORY OF MONTANA, *Lewis and Clarke County:*

William Muth and William Davenport being duly sworn, each for himself, says: That he is a resident of the Territory of
76 Montana, and that he is worth the sum named in the within bond as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt by law from execution.

WM. MUTH.
WM. DAVENPORT.

Subscribed and sworn to before me, this 16th day of September, A. D. 1882.

[Notarial Seal.] WM. CHUMASERO,
Notary Public.

And afterwards, to wit, on the —— day of September, A. D. 1882, said defendants filed herein their citation to accompany said writ of error and undertaking, of which said citation, with the endorsements thereon, in words and figures, the following is a copy, to wit:

77 UNITED STATES OF AMERICA:

In Supreme Court.

MARY A. HOYT, now MARY A. VESTEL, and JOHN W. GONN, Plaintiffs in Error,

vs.

JOSEPH H. RUSSELL, Defendant in Error.

You are hereby cited & admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Montana, wherein Mary A. Hoyt, now Mary A. Vestel, and John W. Gonn are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Decius S. Wade, chief justice of the supreme court of the Territory of Montana, this 16th day of September, A. D. 1882.

[Seal of Sup. Ct. M. T.]

DECIUS S. WADE,
Chief Justice.

78 Endorsement: Service of the above citation is hereby admitted and copy waived. E. W. & J. K. Toole, att'ys for defendants.

79 In Supreme Court, Montana Territory.

JOSEPH H. RUSSELL, Respondent,
vs.
MARY A. HOYT *et al.*, Appellants.

I, I. R. Alden, clerk of the supreme court of Montana Territory, do hereby certify that the foregoing seventy-eight pages, numbered from 1 to 78, inclusive, contain a full, true, & correct transcript of certain pleadings, records, and proceedings, filed, made, and had in the above-entitled cause, as the same remain on file and of record in my office.

In witness whereof, I have hereunto set my hand and affixed my official seal, this 25th day of September, A. D. 1882.

[Seal Supreme Court, Montana Territory.]

I. R. ALDEN, *Clerk.*

Endorsed on cover: Montana Territory supreme court. No. 159. Mary A. Hoyt (now Mary A. Vestel) and John W. Gonn, plaintiff-in error, *vs.* Joseph H. Russell. Filed 1st November, 1882.

Fulkerson's land east, including 2 roes of fi-lds on the west end of the farm; thence a straight line with the fence southerly to a fence running eastward, north of where William Oaks now lives, including a large spring, the am't included around said spring to be laid off by the said Daugherty back to the present road leading to Fielding Seals, and with said road to where said Daugherty's south line crosses the said road, and with said lines to where they intersect with Pace's and Johnson's land; thence with said Daugherty & Jincy Fulkerson's lines north to the beginning; also a small spring between where -he said Oaks and the said Daugherty lives,
77 with a small lott of land attached, to be -aid off by the said Daugherty.

The said Daugherty reserves to himself a road to any of his other lands not intended to be conveyed. Now, if the said Dougherty shall make, or cause to be made, to the said Beaty a good and sufficient deed, then the above obligation to be void; else to remain in full force and virtue.

CHARLES DAUGHERTY.

Witness:
J. H. BALES.

July 13th, 1870.

Endorsed: Chas. Daugherty. Bond to J. M. Beaty. "B."

Deed from James F. Fulkerson to Christy Brunk, dated February 8th, 1868, in the words and figures following:

This deed, made the 8th day of February, 1869, by and between James F. Fulkerson and Mary M. Fulkerson, his wife, of the first part, and Christly Brunk, of the other part, witnesseth: That James F. Fulkerson and Mary M. Fulkerson, his wife, for and in consideration of a certain parcel of land and one sorrel mare, to them in hand paid, the receipt whereof is hereby acknowledged, do grant unto the said Chrisity Brunk and his heirs all their intrust in and to a certain tract or parcel of land lying on the south side of the Poor Valley ridge, and adjoining Charles Daugherty on the north, bounded as follows: Commencing on a white oak and poplar
78 and runs with said Daugherty's back line to a stake, and from that stake with the line dividing Daugherty and Gibson, cornering on white walnut and ches-nut oak two poles north of the top of the Poor Valley ridge, and with the north side of the ridge to a ches-nut oak and *sarves* two poles from the top said of ridge; thence with A. H. Fulkerson's line to the beginning, containing fifty acres, more or less, with all its appurtenances thereunto, to belong to the said Chrisly Brunk; that the said James F. Fulkerson and Mary M. Fulkerson, his wife, will warrent and defend the right of the said land.

Signed, signatures, and seals—

JAMES F. FULKERSON. [SEAL.]
MARY M. FULKERSON. [SEAL.]

[Revenue stamp.]

The court allowed the defendants to read all the above papers to the jury as color of title, but not as evidence of title; to which action of the court the defendants except, and to save the benefit thereof file this their bill of exceptions, and prays that it may be signed, sealed, and made a part of the record, which is done.

The defendants then read in evidence the depositions of John F. Howard, Claiborne Anderson, Nathaniel Ewing (two depositions each), Fielding Seale, James F. Fulkerson, Catherine Ewing,
79 Wm. McDonald, Carr Bailey, in the words and figures following:

JOHN F. HOWARD, a witness of lawful age, being first duly sworn, deposeth and saith:

I am now in my seve-tyieth year and have bi-n afflicted with hydrocele for about four years, and I can -either ride or walk much, and I do not think it would be safe for me to attempt to go to Abingdon to the district court. To the best of my recollection, I came to Lee county and to the neighborhood of the lands now in controversy in this suit and settled on land adjoining that which the plaintiffs claim in this suit about thirty-eight years ago. About 2 years after I moved in the neighborhood I remember to have seen some sorter of cabin-pen or stable, or something intended for people to live in on the two-hundred-and-forty-two-acre survey made by Fulkerson. I have since *saw* the south line of the Holmes' survey and of the *the* two-hundred-and-forty-two acre — made by Peter Fulkerson run, for they run together, and it stood upon the north side of said line. About that time a man by the name of Minton wanted to move upon that land and Col. Fulkerson objected, and Minton grumbled very much about it. Shortly after that time, but my recollection will not suffer me to give the correct date, there was a peace of land cleared and fenced near where the cabin stood. I do not
80 know who cleared the land, but Peter Fulkerson still continued to occupy and use it as if it was his own. Peter Fulkerson and those holding under him have bi-n clearing and useing it ever since continuously. About twenty-three or fo-re or five years ago there was a cabbin built on the east end of the two-hundred-and-forty-two-acre survey and *litter* lands cleared and enclosed around it. There was another cabin near it, which was an older one, but I do not know whether that stood on Fulkerson's old lands, or on the two-hundred-and-forty-two-acre survey; those cabbins *was* bouth at the time of the last built cabbin in the possession of Peter Fulkerson, and has bi-n in his — and those holding under him continuously ever since. Before the entry was made for the five-hundred-acre tract of land Slater Thomas wanted to move on the land; John W. Fulkerson told Thomas that he had better enter the land; Thomas told Fulkerson that he was not able to enter and would not; Fulkerson then told Thomas that he would enter the land an- that he, Thomas, could moove on it, and he did so and lived there many years afterwards; I cannot remember how many. The conversation of these two men did not take place in my presence, but they bouth told me the same, as I have above stated.

John W. Fulkerson *dide* before the pat*t*ent for the five-
81 hundred-acre survey came out, and the pat*t*ent came out in the name of his widow in his stead, together with James Fulkerson and Frederick D. Fulkerson, and said lands have bi-n in possession of the pat*t*entees and those holding under them by themselves and the*r*e tenants ever since.

As for the tract of land which I claim, a part of which is claimed by the plaintiffs in this suit, about twenty-two or three years ago I had a house built on the land and commen*c*eset clearing, and have had uninterrupted possession ever since of that part *part* of the lands which the plaintiffs claim, either by myself or my tenents.

And further this deponent sayeth not.

JOHN F. HOWARD.

Taken April 25th, 1872.

CLAIBORNE ANDERSON, another witness of lawful age, being first duly sworn, deposes and says: I am in my 80th year, and I do not feel able to go to Abingdon to attend the United States district court, on the account of age and bodily infirmity.

I have bi-n a practical surveyor ever since about the year 1814, and I know the *c*ituation of the tract of land of the 242-acres tract, pat*t*ented to Peter Fulkerson and in contr*i*v*e*r*cy* in this cause.

About the time that Evans and other intruders spoken of by other witnesses were on the said tract of land, I surveyed for the
82 Fulkersons on this 242-acre tract and run the south and east lines of said tract.

As to the cab*b*ins which Mr. Howard mentione*s* in his deposition taken to-day in my presen*t*s, on the east end of said tract, I ascertained them by my running to be north of the south line of the 242-acre survey, and lying within it; one of those cab*b*ins was verry near but north of the line, and north of this cab*b*in there was a small lot cleared and enclosed, an- seemed to have *bi*-n cleared a long time, and in the 242-acre tract.

I remember of seeing those cab*b*ins and that spot of cleared land as far back as 1839 or '40. When I made the survey there was a considerable amount of land cleared in the 242-acre survey, all of which seemed to have bi-n cleared some years before I made the survey. The first occupant I -new on the land was James Hobbs; he went on the land in the cab*b*in farthest north, under Peter Fulkerson, Jr., and remained on the lands several years, and was succeeded by Joseph Napper; he remained on the land under Mrs. Fulkerson, to whom Mr. Fulkerson, who had in the meandime di*d*e and left his lands by will, the possession of those cab*b*ins and the cleared lands on the 242-acre tract has bi-n ever since the year 1839 or '40 continually in Peter Fulkerson —, Jr., an- those holding under him, to the present time. When I run the south line
83 of the 242-acre tract through the rooty field and the brier field mentioned in other depositions which I have he-rd taken here to-day in this cause, I found by my running that the north part of boath of those fields was in the 242-acre tract, and the land seemed to have bi-n cleared for 10 or 15 years; the ground was all

grown upp in briers and bushes, and the fence was almost all rotten. There was a cabbin that stood in the rooty field; it was almost rotten, and stood on the 242-acre tract; there was a large spring in the brier field that was likewise in the 242-acre tract; I -new nothing of the rooty field and brier field untill I run the line.

As to John F. Howard's lands in controversy in this cause, I ran for Mr. How, twenty years or more ago, the east line of the land claimed by the plaintiffs in this cause, running north 5 west 400 poles. I ran from plaintiff's southeastern corner on that co-rse until I crossed the Poor valley and then stopt. That line of the plaintiff runs through a tract of land owned by the said Howard. That line ran east of a house, and some cleared and inclosed land around it, which was then occupied by William Laylor, who was a son-in-law of the said Howard, and I understood from Howard at the
84 time I was running that Laylor was there in possession under him. I have never b-in there and -no- nothing more of the pos-ession of that land.

And further this deponent saith not.

CLAIBORNE ANDERSON.

Taken 25 April, 1872.

NATHANIEL EWING, a witness of lawful age, being first duly sworn, deposes and says:

I do not believe that I will be able to go to Abingdon at the next term of the United States district court at that place.. I have b-in in bad health for some years past, and am not able to go to Abingdon now and do not expect that I will be able then. If I do not attend that court it will be because I am not able to get there.

I was at the dwelling-house of Col. Peter Fulkerson in the summer or early in the fall of 1837. I remember the date because I was married to a daughter of Col. Fulkerson on the 4th day of July, 1837, and the occurrence was shortly after my mar-age in that same season. While I was there Mr. Holms came thare, who they called Doctor Holmes—I think his name was John Holms—to inquire about a tract of land in Lee county which he claimed. Doctor Holms and Mr. Fulkerson had some conversation about the land, and Mr. Fulkerson -new the land and showed it to Doctor Holms
85 from his door, the land lying on the south side of the Cumberland Mountain, including the Poor Valley and the Poor Valley ridge.

The lands *was* in view of Col. Fulkerson's door. Doctor Holms staid all night with Col. Fulkerson, and the next morning those two gentlemen got on their horses and rode out upon the land to look at it. They rode out through the gap of the Poor Valley ridge, and after some time returned. After they returned Dr. Holmes expressed himself, in conversation, to be very much dissatisfied with his land, and said that there had bi-n fraud practiced upon his father, & that he would not pay tax on the land, and would have nothing more to do with it. Holmes staid at Col. Fulkerson's several days. He then went away. My understanding was that he was from Philadelphia. After Doctor Holmes went away Col. Fulkerson said he would enter

a portion of that land between his own land and the top of the Poor Valley ridge, to keep out intruders, who *mite* be troublesome to him. I understood afterwards from him that he had made the entry, and he showed me where it *lay*, and it is the entery which I believe to be the two hundred [and] forty-two acre survey. At the time he made that entry and survey he had cleared, enclosed, and had in cultivation a field known as the Rooty field. I did not know exactly where the south line of Holmes' tract run, but it was pointed
86 out to me, and the north part of the Rooty field was in the Holmes tract. Since that time there *has* been lands cleared likewise adjoining the Rooty field on the Holmes tract, and those lands, since the year 1837, *has* bi-n in the pos-ession of Col. Fulkerson and those holding under him to the present time, constantly and without interruption, with the exception of a trespass upon them by Gilt Evens and other-; but they were verry soon turned off by legal proceedings.

The north part of the Rooty field and the other lands that *was* cleared adjoining shortly afterwards *was* in the two hundred and forty-two acre survey made by Col. Fulkerson.

And further the deponent says not.

NATHANIEL EWING.

Taken April 24th, 1872.

FIELDING SEALE, another witness of lawful age, being first duly sworn, deposes and says:

I am fifty-nine years old, and I am and have bi-n for some time afflicted with a fixed diseas-, so that I cannot possibly attend the United States district court at Abingdon. I can ride a few miles some days, and others I cannot ride at all.

In the year 1842 I moved on Col. Peter Fulkerson's old tract of land, and lived there something more than two years. I mooved there in the fall, and the following spring Col. Fulkerson
87 emploi-d me to clean upp an old brier field. He give me all that I made on the field to clean it up. The land had bi-n cleared some time before and was grown up in briers and bushes. The field was then enclosed with a verry old fence, which I had to repa-re. I did clean the field up and cultivate the field that year.

The above-named brier field lay adjoining the Rooty field, on the east; the Rooty field was then cleared, and had bi-n cleared, or seemed to be, for a good while. About the time Col. Fulkerson emploid me to clean up the brier field above named he told me that the north part of the brier field, and also the north part of the Rooty field, was in an entery that he hade made from his back line to the top of the Poor Valley ridge. But I *have no* nothing of the line of my own knowledge, only what he told me, having never seen it run. Col. Fulkerson likewise teld me, while I was living upon his lands, at a subsequent time, that he had devided his old tract of land among *fore* of his sons, and showed me where he had run the deviding lines across the valley north and south, and that he intended that each of those sons should use so much of the two hundred and

forty-two acre survey as lay a-joining and opposite to the lands of the old tract that each one of them was to *owned;* they accordingly took possession of the portions of the two hundred and forty-
88 two acre survey which lay opposite their *shears* of the old tract. Ever since the year 1842, Col. Peter Fulkerson, and those hold*i*ng under him, have had continual possession of the lands above described to the present time, except that Evins and others, in the year 1853 or '4, intruded upon the 242-acre tract, but the sons of Col. Fulkerson ejected them, and got rid of them by legal proceedings.

In the year 1844 I moved to Missouri, and in 1846 I came back, and went into a house on Col. Fulkerson's old tract of land, and I lived on said lands till March, 1851. During that time Gallahorn buil*d* a cab*b*in, cleared and enclosed land on that part of the 242-acre tract which lay opposite to James Fulkerson's *shear* of the old tract, and he did this under a leace from James Fulkerson. This land has also b*i*-n in possession of James Fulkerson and those claiming under him to the present time. Awhile before the death of Col. Peter Fulkerson, which, as well as I can recollect, was in the spring of 1847, a man by the name of Busic leased from Frederic D. Fulkerson and built a cab*b*in and cleared a field. The cab*b*in and the northern portion of the field was, according to where Col. Fulkerson showed me, the line on the 242-acre tract, and this land likewise has b*i*-n in the po-session of those claiming under Peter Fulkerson ever since.

89 As to the 500-acre tract pat*t*ented to James Fulkerson, Frederic D. Fulkerson, and Elizabeth Fulkerson, all that I know about that is that John W. Fulkerson told me shortly before his death of a conversation between himself and Slater Thomas. Mr. Fulkerson told me that Slater Thomas wanted to moove in the Poor Valley, on the 500-acre tract. Fulkerson advised Thomas to enter the land. Thomas told him that he could not; that he was not able. Fulkerson then told him that he would enter the land, and that he, Thomas, mi*t*e moove on the land, and Thomas did moove on the land and lived there many years. Shortly after that conversation I carr-ed his papers to the office, to have the entry made.

John W. Fulkerson having di*d*e, the pat*t*ent was issued to Elizabeth Fulkerson, his widow, instead of [to] him, as one of the pat*t*entees. The said tract, ever since Slater Thomas went upon it, has b*i*n in the pos-ession of the pat*t*entees, or some one holding under them, from the date of the pat*t*ent.

In relation to the lands owned and claimed by John F. Howard, in controversy in this cause, shortly after the Mexican war closed John B. Baldwin came back and marr-ed Mr. Howard's daughter, and shortly after built a house and mo*o*ved on the land. Mr. Baldwin went on the land under Mr. Howard, and held pos-es-
90 sion of the lands under him until the year 1862. Since that time I have not b*i*n there, and know nothing about further pos-ession.

And further the deponent says not.

FIELDING SEALE.

Taken 25 April, 1872.

JAMES F. FULKERSON, of lawful age, being duly sworn, deposes and says:

I am now about 40 years of age; was born and reared in sight of the land embraced in the 242-acre tract in controversy in this suit, and as far back as I can remember, about 30 years ago, I have known the said land, and I have no interest whatever in that tract. I have no knowledge of the southern boundary of said land separating it from Peter Fulkerson's old tract, except that I saw that line run when Mr. Bailey, the county surveyor at the time, run the same in a controversy then pending in the county court of Lee county; and, according to that line as then run by Mr. Bailey, a field known as the Booty field and the Hill field, a part of each of them, lay north of that line and within the 242-acre survey. I am of opinion that about two acres of the Booty field and one & a half acres of the Hill field were thrown by that line into said 242-acre survey, the residue being in the old Peter Fulkerson tract. As far back as I can remember, about 30 years ago, I remember
91 to have picked blackberries upon the one & a half acres of the hill field, included in the 242 acres survey, and at the same time the Rooty field was in cultivation, and it and the Hill field were both in cultivation by witness' grandfather, Peter Fulkerson, and the same have continued in his possession, and those claiming under and through him, up to the present time, except that about 1854, '5, or '6 a man by the name of Evans, with his tenants, took possession of parts of the said tract of land, but suits were immediately brought against them, and they were soon ejected by the judgment of the court. My uncle, Peter Fulkerson, Jr., lived east of where my father lived, and opposite the eastern end of the 242 acres tract, and about 25 years or more, perhaps, ago, the said Peter Fulkerson, Jr., leased to a man by the name of Hobbs a part of said 242 acres survey, being that part of it lying immediately north of where the said Peter Fulkerson, Jr., then lived, upon a part of the old Peter Fulkerson tract, and the said Hobbs lived upon said land, under said lease, some seven or eight years, and since that time up to the present time the possession of said land has been uninterruptedly continued in the said Peter and those claiming under him. As to the 500 — tract in controversy patented to my mother, Harriett E. Fulkerson,
92 my uncles, Frederick and Jam-s Fulkerson, the entry & survey thereof was made in the lifetime of my father, John W. Fulkerson, and in his and the names of his two brothers, Frederick and James; the same was entered and surveyed, but before the patent was issued my father, the said John W., died, and my mother, the said Harriett E., was substituted in his place, and the patent issued to her and to my two uncles, Frederick and James aforesaid. After the entry and survey aforesaid was made, my father, the said John W. Fulkerson, a short time before his death, leased a part of the said 500 acres tract to a man named Slater Thomas, who imme-

diately moved upon it and held possession of it, under that contract, until the death of my father, and, soon after his death, James Fulkerson, acting for himself and the other patentees, renewed said lease with said Thomas, who continued to live on there till 1855 or 1856; and just as soon as Slater Thomas left witness took possession thereof, and has ever since continued in possession thereof, either in person or by his tenants, and still holds possession of the same.

I am now preparing to remove to the State of Texas, and calculate on starting about one week from this day.

On cross-examination witness states that at least one-half, perhaps more, of the 242 acres tract is inclosed. Within the past
93 fifteen years about twenty acres of said 242 acres tract has been cleared and enclosed.

And further this deponent sayeth not.

JAMES F. FULKERSON.

Taken 4th Sept., 1872.

NATHANIEL EWING, after being duly sworn, deposes and says:

Question 1st by defendant FULKERSON. Mr. Ewing, please state your age.

Ans. Sixty-four years.

2nd. Do you know that Lee S. Fulkerson is the legal heir of Harriet E. Fulkerson?

Ans. I certainly do know that he is.

Q. 3rd. Are you or not able to attend the United States Federal court or not?

Ans. I am not.

And further this deponent saith not.

NATHANIEL EWING.

Taken 23d Octo., 1873.

CATHARINE EWING, a witness of lawful age, after being duly sworn, deposes and says:

Question by defendant FULKERSON. Mrs. Ewing, please state what your age is.

Ans. I am sixty-four years of age.

2nd. Please state whether or not you know whether Lee S. Fulkerson is a lawful heir of Harriet E. Fulkerson.

94 Ans. I saw Harriet E. Fulkerson nursing him when he was an infant, and I have known him ever since, and she claimed him to be her son.

3rd. Are you able to attend the United States Federal court at Abingdon?

Ans. I am not.

And further this deponent sayeth not.

CATHARINE EWING.

Taken 23d Octo., 1873.

JOHN F. HOWARD, a witness of lawful age, after being duly sworn, deposes and says:

Question 1st b- defendant FULKERSON. Mr. Howard, please [state] your age.

Ans. I am seventy years old.

2nd. Please state whether or not you know whether Lee S. Fulkerson is a lawful heir of Harriet E. Fulkerson.

Ans. I have known Lee S. Fulkerson for thirty-five or forty years, when he was quite a small boy with his mother, Harriet E. Fulkerson; she then claimed him to be her lawful heir.

3d. Mr. Howard, are you able to attend the United States Federal court at Abingdon?

Ans. I am not.

And further this deponent says not.

JOHN F. HOWARD.

Taken 23d Octo., 1873.

95 CLAIBORNE ANDERSON, a witness of lawful age, after being duly sworn, deposes and says:

Question 1st by defendant FULKERSON: Mr. Anderson, pleas*t* state w-at your age is.

Ans. I am eighty years old.

2nd. Pleas- state, if you know, whether Lee S. Fulkerson is a lawful heir of Har-et E. Fulkerson.

Ans. I have known Lee S. Fulkerson for about thirty-five years; he always claimed Harr-et E. Fulkerson to be his mother, and she claimed him to be her son..

3. Mr. Anderson, are you able to attend the Federal court at Abingdon?

Ans. I am not.

And further this deponent says not.

CLAIBORNE ANDERSON.

Taken 23d Octo., 1873.

The deponent, aged about 74 years and duly sworn, deposeth and saith:

Question by the def'ts: Please state whether or not you are acquainted with the lands in controversy in the two suits above referred to.

Ans. I am acquainted with the boundary claimed by John F. Howard; the greater part of it lies within the boundary claimed by the plaintiffs, as run by Carr Baily, surveyor. I am also acquainted with the land claimed by W. W. Fulkerson and his
96 sister, and the land claimed by Lee S. Fulkerson, which lie within the plaintiff's boundary as run by Carr Baily; I cannot say that I am acquainted with the boundary of Beatty's heirs and Chas. Daugherty.

By same: How long have you been acquainted with the lands claimed by Howard, L. S. Fulkerson, W. W. Fulkerson, & Margaret E. Fulkerson?

Ans. I have been pretty well acquainted with these lands for the last 28 years this coming fall.

By same: Please state whether or not during all that time these lands have been in the occupancy and possession of any person or persons.

Ans. When I came to this county I found Jos. Napper upon the land now claimed by W. W. Fulkerson and his sister Margaret, and Henry Thomas was living on the same land. I also recollect that Slater Thomas was living on the land claimed by Lee Fulkerson, and —— Saylor was living on the land claimed by Howard. It is about 28 years this coming fall since I moved to this county.

By same: Who were these tenants living on the lands you have named under; or, in other words, who did they claim to hold the lands under?

Ans. As to the lands now claimed by W. W. Fulkerson & Margaret E., I would have to say they claimed under their mother, Eleanor; and as to the land now claimed by Lee Fulkerson,
97 they claimed under Patrick Ewing; at the time I first came to the county the said Ewing owned the land now in controversy between pl't'ffs & L. S. Fulkerson; and as to those living on the land now claimed by Howard, they claimed under him.

By same: Now state whether or not all the subsequnt tennents on said lands have claimed under the same title from them down to now.

Ans. They have all claimed under the same with one exception. This exception is this: Some years ago one Geo. Evans came here claiming under one Gitt and Henry Thomas, who was tenant under Ellenor Fulkerson; took shelter under and claimed under him; afterwards an unlawful entry or some other legal proceedings was brought *vs.* Evans, and he was turned out of possession. About 19 or 20 years ago Dr. Jno. Holmes called and stayed all night with me (this was after Evans took possession, and after he had been dispossessed), and Holmes then said to me that he had come to look after the 3,000-acre survey which had been patented to Young, and I then told him that there had beon a suit about it with Evans, and he then said that Evans or Gitt never had anything to do with the Holmes claim, and the trial or suit of Evans or Gitt was not on their title papers.

Cross-examined:

98 1st Ques. by pl't'ffs' counsel: Please state, if you know, whether Jno. F. Howard claims under more than one patent any lands within the plaintiffs' claim.

Ans. He claims under not less than two, and may be three.

2d Ques. Are you acquainted with the boundaries of each of his patents?

Ans. I am acquainted with the boundaries of three of them.

3d Ques. Please give the No. of acres in each, if known to you.

Ans. I do not know.

4th Ques. Which of these patents was occupied by Saylor, of whom you spoke in your examination-in-chief, if any?

Ans. The main survey, which lies immediately in the Poor Valley.

5th Ques. How many years did Saylor live on the place?

Ans. I do not recollect, but I think he lived there not less than three, may be 4 or 5 years.

6th Ques. Do you know when he moved off?

Ans. I cannot tell when he did leave or how many years he lived there, but when he left John Baldwin moved in his place, and he and Jim Fulkerson lived on the place until the com-
99 mencement of the war.

7th. How do you know that Saylor claimed under Howard?

Ans. He told me so; he told me he had a promise of a deed of gift, but not getting it he left.

8th Ques. Where does Mr. Howard himself live?

Ans. The house or cabin he lives in is not within the plaintiffs' boundary, but he cultivates land within it; the principal part of what he cultivates is in it.

Quest. You will please state how long Jos. Napper continued to live on said land, and state who succeeded him, and how long each successor lived on the same land.

Ans. I cannot tell exactly, but Napper must have been there three or four years or more; I think Henry Burke succeeded him, and he lived up till the war; I do not know who went in after him, but there has always been some one on it since I became acquainted with it in 1852, but cannot state their names; these tenants that lived on Howard's lands were sons-in-law of J. F. Howard.

Ques. Were you with Carr Bailey when he ran out the boundaries of the Young patent?

Ans. I was.

Ques. Did you find the corners and line trees as called for?

100 Ans. No; none that were marked.

Ques. Do you know any of the corners of the survey?

A. I do not.

*See pages 7, 8, 9, 10, & 11.

And further this deponent saith not.

WM. McDONALD.

(Page 7 referred to.)

Ques. by pl'tffs. Have you ever seen the patents under which Lee Fulkerson claims; and, if so, do you know the boundries of each?

Ans. I have never seen them, and do not know their boundaries; I know the line he claims, but do not know that these agree with the patents.

Ques. Does your knowledge, then, in regard to the claims of defendants depend upon what they have told you in regard to it? If otherwise derived, state the source of your knowledge.

Ans. In part it is what they told me, and I was with Carr Bailey when he surveyed certain lines, and his running confirmed the way they claimed it.

Ques. Can you tell upon what particular patent the tenant of Patrick Ewing was living when you first became acquainted with these lands?

Ans. It was on the Martin survey he was living, and he
101 occupied part of the land within the plaintiffs' claim. (Page 8 referred to.)

Ques. Do you know the boundaries of the patent or patents, under which W. W. Fulkerson and his sister, Margaret E., claims; that is, have you ever seen the patents?

Ans. I have never seen the patents.

Ques. Have you ever seen any of the patents under which any of the defendants claim, or what you know to be correct copies of the courses of the patents?

Ans. I have never seen any of the patents, nor have I seen what I know to be correct copies of the patents, but I have seen a copy of the boundary of land claimed by the heirs of Jno. Beaty, dec'd. This land formerly belonged to Dr. Jim Fulkers, and part of this boundary as claimed by said heirs run into the plaintiffs' claim. I was one of the commissioners who partitioned the land between Beatty's heirs. I have also seen courses of the land claimed by W. W. Fulkerson & his sister Margaret, or at least the courses claimed by them, and by which Carr Baily ran the last time. (Page 9 referred to.) And at this time the said Baily also ran the claims of Jno. F. Howard, and I saw the way he ran the lines which he ran at that time, but as to go all around the lines I did not. I went as far as said Baily then went.

102 Re-examined by def'ts:

[Ques.] State all you know about a patent to Wm. King, called the Fisher survey, and whether or not it conflicts with Young's patent of 3,000 acres.

[Ans.] So far as the King patent under which Fisher claims, I have never seen it, but I have seen what purports to be a true copy, and from the running I have seen of the Young survey and the Fisher survey, there is about 150 acres of the Fisher survey which covers the Young survey. The interlock is on the N. E. side of the Young survey.

[Ques.] State whether or not any of the lands in controversy in this suit liyes in the interlock between the King & Young patents. (Page 10 referred to.)

Ans. All the interlock is in controversy in these suits.

[Ques.] Which of the defendants in these suits claims the lands in the interlock?

Ans. Jno. F. Howard.

[Ques.] Please state whether or not John F. Howard claims the land in the interlock by purchase under the Wm. King patent.

Objected to, as if he claims under purchase it can be shown by better evidence. Hagan for pl't'ff's.

103 Ans. He claimed it by deed from Crabtree & Dickenson, who claimed to have purchased the Fisher lands. He has seen the deed from Crabtree & Dickenson to Jno. F. Howard. The date of the deed will show when it was made. Howard had Jno. Napper living on it when I first came to this country.

Re-ex.:

Ques. Have you ever seen the lines of the Fisher survey run from (page 11 referred to) the patent, or an authenticated copy?

Ans. In part I have, but not enough to give any general satisfaction about it, but have not seen any of the lines run conflicting with the Young survey; I only know it from the calls of the deed of Crabtree & Dickenson to Howard, and partitioning the lands of the heirs of Jno. Sims, dec'd; the said Sims bought from Crabtree & Dickenson.

Taken 26th March, 1880.

CARR BAILEY, a witness of lawful age, being first duly sworn, deposes & says that he made the survey in the matter of controversy between the parties, he believes, some time in September, 1873, and that he made plats and reports of said survey, which he filed in the clerk's office of the United States court at Abingdon, Virginia,
104 and that the tract of land known as the Holmes land, or the 3,000 acre survey, made in the name of Samuel Young, is embraced in said plats and reports as laid down by him, and he knows the fact that W. W. Fulkerson, L. S. Fulkerson, and others, have possession of lands embraced in *in* said 3,000-acre tract of land. The beginning corner of the survey as made by me, I believe, called for a gum and hickory. I am inclined to believe the gum was gone when I made said survey. I am not sure that the hickory was marked; but that point was shown to me as the beginning corner of Joseph Martin's survey, I believe, by Frederick S. Fulkerson, Claiborne Anderson, and perhaps others, I think, about the year 1853 or 1854, which was on an occasion of a survey I then made between a man by the name of George Evans in a suit he brought against said Frederick S. Fulkerson and others. Evans claimed the Holmes or Young tract of land, which he claimed, I believe, under a man by the name of Gitt. Said land lies in Lee county, Virginia. I have been acquainted with said Holmes or Young survey for over forty years; and old Peter Fulkerson, the father of Frederick S. Fulkerson, and the grandfather of W. W. Fulkerson & L. S. Fulkerson, then had possession of parts of said tract of land;
105 Peter Fulkerson had some tenants on said land. I remember one man, who lived on said land over 40 years ago, was by the name of Levi Chann. He lived on said land near the Joseph Martin line. I believe the land then occupied by said Chann is now in the possession of John M. Beaty's heirs. I believe that Peter Fulkerson and those claiming under him have had continuous possession of said land for over 40 years.

And further this deponent saith not.

CARR BAILEY.

Taken April 23d, 1880.

A certificate from the auditor of public accounts, dated September 5th, 1876, in the words and figures following:

Table of Tracts of Land for the year —, in Lee County, in — District, ——, Commissioner of the Revenue, Assessed with Taxes thereon at 50 cents on every $100 Value thereof.

	Name of person who, by himself or by his tenant, has the freehold in possession of the land charged.	Residence of owner of the tract of land.	Nature of the owner's estate, whether held in fee or for life.	Number of acres in each tract.	Name of the tract and description of the land as to water-courses, mountains, or other places on or near which it lies.	Distance and bearing from the C. H.		Total value of land per acre, including buildings.	Total value of the land and buildings.	The am't of tax on the whole tract at 50 cents on every $100 value thereof.	Explanations of alterations during the preceding year, especially from whom transferred, and when and how the owner devised the land, and why and upon what authority any alteration was made.
						Bearing from C. H.	Miles.				
1827	Young, Samuel	Philadelphia		5,000	Unknown	Unknown		1-5	60	05	De'q't.
"	" "	"		1,000	"	"		1-5	12	01	"
"	" "	"		300	Poor Valley ridge	N. E.	24	1-5	3 60	01	"
1828	" "	"		5,000	Unknown	Unknown		1-5	60	5	"
"	" "	"		1,000	"	"		1-5	12	2	"
"	" "	"		300	Poor Valley ridge	N. E.	24	1-5	3 60	1	"
1829	" "	"	Fee	5,000	Unknown	Unknown		1-5	60	5	"
"	" "	"	"	1,000	"	"		1-5	12	2	"
"	" "	"	"	300				1-5	3	1	"
1830	" "	"	"	5,000	Unknown	Unknown		1-5	60	5	"
"	" "	"	"	1,000	do.	do.		1-5	12	2	"
"	" "	"	"	300	do.	do.		1-5	3	1	"
1832	" "	"	"	5,000	Unknown	do.		1-5	60	5	Paid.
"	" "	"	"	1,000	do.	do.		1-5	12	1	"
"	" "	"		300	do.	do.		1-5	3	1	"

7—160

107 The books of Lee county prior to 1827 are missing from this office. They must have been lost during the occupancy by Federal troops of the capitol in 1865. The records show that the lands of Samuel Young, 3 tracts, viz., 5,000, 1,000, and 300 acres, in Lee county to 1822, inclusive, had the taxes paid. The taxes released to 1831, inclusive, and returned among the unascertainable lands in 1832, and subsequently drop-*t* from the commissioners' books of Lee county. Find nothing in the name of Samuel C. Young.

The foregoing is a true extract from the land books of Lee county and the records of my office.

Given under my hand at the auditor's office this the 5th day of September, 1876.

WM. F. TAYLOR,
Aud. Pub. Acc'ts.

The defendants then introduced Lee S. Fulkerson as a witness, who proved that Peter Fulkerson, Sr., died in 1848; that James, Peter, Frederick D., and John W. Fulkerson were sons of said Peter, and that they were all dead; that the defendants, W. W. Fulkerson and Margaret Fulkerson, were the heirs of Peter Fulkerson, Jr.; that the defendants, Napoleon S., Samuel M., William H., John P., Corneliu- J., Burgoyne Beattie, and Charles E. Baylor and wife, Judson Hatcher and wife, were the heirs of the said John M. Beattie.

108 The plaintiffs, to further sustain the issue on their part, read in evidence a certificate of the county clerk of Lee county in the words and figures following:

VIRGINIA:

At a court of quarter sessions begun and held for Lee county, at the court-house thereof, on Monday, the 21st day of March, 1836.

Abraham Crabtree, gentleman, this day produced to the court a commission under the hand of the Governor of this Commonwealth, with the seal of the Commonwealth thereto affixed, whereby he is commissioned to execute the office of sheriff of this county until the first quarterly term of this court for the next year; and thereupon the said Abraham Crabtree, together with Acles Wynn, Smith Crabtree, Elkanah Wynn, Robert B. Beaty, David Young, Alexander Litton, John Smith, George Smith, Robert W. Wynn, and Stephen Jones, his securities, entered into and acknowledged three several bonds in the penalty of $30,000 each, conditioned according to law, which bonds are ordered to be recorded, and the said Abraham Crabtree took the oath of fidelity to the Commonwealth, the oath prescribed by law to suppress duelling, the oath to support the Constitution of the United States, and the oath of office. Jacob V. Fulkerson, Job Crabtree, Frederick D. Fulkerson, Archibald H. Stewart, and William W. Bell are, by Abraham Crabtree, gentleman, sheriff of this county, appointed his deputy sheriffs during pleasure; and the
109 court being of opinion that the said Jacob B. Fulkerson, Job Crabtree, Frederick D. Fulkerson, Archibald H. Stewart, and

William W. Bell are men of honesty, probity, and good demeanor, they severally took the several oaths prescribed by law.

A copy.

Teste: JAMES W. ORR, *Clerk.*

They also read certificate of Job Crabtree in the the words and figures following:

LEE COUNTY, *to wit:*

I, Job Crabtree, deputy for Abraham Crabtree, sheriff of said county *county*, do certify that I have placed a tract of land in the name of Samuel Young for 3,000 acres, which was returned in the year 1834 not ascertainable on the commissioner's books of said county of Lee, and taxed the damages thereon.

JOB CRABTREE, *D. S.*,
For ABRAHAM CRABTREE, *S. L. C.*

14th Dec., 1837.

And a certificate of the auditor of public accounts, with extract from land books, in the words and figures following:

110 *Table of Tracts of Land for the Year* 1876, *in Lee County, in — District, —— Commissioner of the Revenue, Assessed with Taxes thereon at 50 cents on every* $100 *value thereof.*

	Name of person who, by himself or by his tenant, has the freehold in possession of the land charged.	Residence of owner of the tract of land.	Nature of the owner's estate, whether held in fee or for life.	Number of acres in each tract.	Name of the tract and description of the land as to water-courses, mountains, or other places on or near which it lies.	Distance and bearing from the C. H.		Total value of land per acre, including buildings.	Total value of the land and buildings.	The am't of tax on the whole tract at 50 cents on every $100 value thereof.	Explanations of alterations during the preceding year, especially from whom transferred, and when and how the owner devised the land, and why and upon what authority any alteration was made.
						Bearing from C. H.	Miles.				
1838	Holmes, John, J. W. Morrison, ag't..	Philadelphia...	Fee....	3,000	Waters—Martin's creek..	W.	20	1 1-5	36	04	By deed from Sam'l C. Young.
1839	" " "	" ...	"	3,000	do. ..	W.	20	1 1-5	36	04	
1840	Holmes, John, Jr.....	" ...	.....	3,000	do. ..	"	20	20	6 00	60	
1841	Holmes, " "	" ...	.....	3,000	do. ..	"	20	20	6 00	75	
1842	" " "	" ...	.....	3,000	do. ..	"	20	20	6 00	75	
1843	" " "	" ...	.....	3,000	do. ..	"	20	20	6 00	90	
1844	" " "	" ...	.....	3,000	do. ..	"	20	20	6 00	75	
1845	" " "	" ...	.....	3,000	do. ..	"	20	20	6 00	60	
1846	" " "	" ...	.....	3,000	do. ..	"	20	20	6 00	60	
1847	" " "	" ...	.....	3,000	do. ..	"	20	20	6 00	60	
1848	" " "	" ...	.....	3,000	do. ..	"	20	20	6 00	60	
1849	" " "	" ...	.....	3,000	do. ..	"	20	20	6 00	60	
1850	Holmes, John	" ...	.....	3,000	do. ..	"	20	20	6 00	60	
1851	" "	" ...	.....	3,000	.....	.....	.....	1 00	3,000	3 60	
1852	" "	" ...	.....	3,000	.....	.....	.....	1 00	3,000	5 40	
111											
1853	" "	" ...	.....	3,000	.....	.....	.....	1 00	3,000	6 00	
1854	" "	" ...	.....	3,000	.....	.....	.....	1 00	3,000	6 00	
1855	" "	" ...	.....	3,000	.....	.....	.....	1 00	3,000	6 00	
1856	" "	" ...	.....	3,000	.....	.....	.....	1 00	3,000	12 00	
1857	" "	" ...	.....	3,000	Martin's Creek.....	W.	14	2 00	6,000	24 00	
1858	" "	" ...	.....	3,000	do.	"	14	2 00	6,000	24 00	Tax paid, $25,70; Oct. 26, 1859, at this office.
1859	" "	" ...	.....	3,000	do.	"	14	2 00	6,000	24 00	
1860	" "	" ...	.....	3,000	do.	"	14	2 00	6,000	24 00	
1861	" "	" ...	.....	3,000	do.	.....	14	2 00	6,000	24 00	Released by general law. Tax imposed by Confederate State Va.
1862	" "	" ...	.....	3,000	do	.....	14	2 00	6,000	36 00	do. do.
1863	" "	Penn.....	Fee....	3,000	Cumberland Mt.....	W.	14	2 00	6,000	60 00	do. do.
1865	" "	" ...	"	3,000	do.	"	14	2 00	6,000	12 00	

1866	"	"	"	"	3,000	do.	"	14	2 00	6,000	8 40		
1867	Holmes, John		"	"	3,000	do.	"	14	2 00	6,000	18 00		
1868	"	"	"	"	3,000	do.	"	14	2 00	6,000	18 00		
1869	"	"	"	"	3,000	do.	"	14	2 00	6,000	18 00		
1870	"	"	"	"	3,000	do.	"	14	2 00	6,000	30 00		
1871	"	" est.	"	"	3,000	do.	"	14	2 00	6,000	30 00		
1872	"	" "	"	"	3,000	do.	"	14	2 00	6,000	30 00	Tax still due.	
1873	"	" "	"	"	3,000	do.	"	14	2 00	6,000	30 00		
1874	"	" "	"	"	3,000	do.	"	14	2 00	6,000	30 00	do.	do.
1875	"	" "	"	"	3,000	do.	"	14	2 00	6,000	30 00	do.	do.

112 I, William F. Taylor, auditor of public accounts for the Commonwealth of Virginia, hereby certify that the foregoing is a true extract from the land books of the commissioners of the revenue for the county of Lee for the years 1838 to 1875, both inclusive, mentioned in the left-hand margin of lands assessed to John Holmes, John Holmes, Jr., and John Holmes' est. for each of said years.

Given under my hand at the auditor's office, in the city of Richmond, Va., this the 5th day of September, 1876.

WM. F. TAYLOR,
Aud. Pub. Acc'ts.

This was all the evidence introduced in the cause.

The plaintiffs thereupon moved the court to give two instructions in the words and figures following

HOLMES *et als. vs.* FULKERSEN *et als.*

No. 1. The court instructs the jury that if they believe from the evidence in this cause that the Commonwealth, by letters patent, on the 7th day of May, 1787, granted to Samuel Young the parcel of 3,000 acres of land in the declaration mentioned; that Samuel C. Young was the only child and heir of Samuel Young; that Samuel C. Young conveyed the said 3,000 acress by deed of the 12th day of July, 1819, to John Holmes, of the city of Philadelphia, Penn.; that said John Holmes is dead, and that the plaintiffs are his heirs, then, the title to this land is satisfactorily traced to the pl't'ffs, and that in consequence of the antiquity of the deed of Samuel C.
113 Young to John Holmes of 12th July, 1819, & its custody by said Holmes, the jury may be justified by the testimony tending to prove an acknowledgment of this title by those under whom defts claim to accept the recitals of said deed as to the heirship of Sam'l C. Young.

Pl't'ffs' 2d instructions:

2. The junior patents to Peter and James Fulkersen were admitted in evidence, not as proofs of title in def'ts, but merely to establish a color of title by which the def'ts might rely on the defense of an adversary possession for the time prescribed by the statute of limitations; but to sustain this defense the jury are instructed that the def'ts must prove an adversary and hostile possession, an entry with claim of title, and an actual intent to hold against the original patentee and the claimants under him; and if the jury shall believe that the entry of those under whom def'ts' claim was made in knowledge of and in subordination to plaintiffs' title, such entry and possession cannot be construed as adversary or as constituting a valid defense under the statute of limitations; but if, after the original entry & possession, the parties chose to convert it into an adversary possession, by virtue of which they could perfect a title by lapse of time, it is incumbent upon them to prove to the satisfaction of the jury that they disclaimed the character of their original entry

and possession, and gave notice to the plaintiffs of their
114 claim to hold the land adversely under claim of title in themselves; and in the absence of such proof the jury will be warranted to believe that the entry and possession continued as both commenced.

The defendants objected to each of said instructions because they did not correctly give the laws of the case, but the court overruled their objections and gave said instructions; to which action of the court the defendants except, and to save the benefit thereof file this their bill of exceptions and pray that it may be signed, sealed, and made a part of the record, which is done.

The defendants then move the court to give the jury twelve instructions, in the words and figures following, & numbered "1," "2," "2½," "3," "4," "5," "6," "7," "8," "8½," "9," "10."

Instructions asked for by def'ts:

HOLMES' HEIRS *vs.* FULKERSEN *et als.*

No. 1. The court instructs the jury that the defendants, being in possession of the land, the pl't'ffs cannot recover the land from them, unless the *the* jury should believe from the evidence that the plaintiff- have a clear right to said land or some part thereof. Rejected.

No. 2. The court instructs the jury that the plaintiffs have attempted to show a right under Samuel Young's patent, & that they cannot derive title from Samuel C. Young, unless they prove to the satisfaction of the jury that Samuel Young['s] rights passed by
115 deed, devise, or descent, to Samuel C. Young, under whom the plaintiffs claim. Given.

No. 2½. The court further tells the jury that the recitals in the deed of Samuel C. Young, that he is the only heir of Samuel Young, has been permitted to be read to the jury as evidence; yet it is left to the jury to decide from all the facts and circumstances in evidence before them whether Samuel Young is dead or not, and whether Samuel C. Young is his only son & heir or not, and unless they should be clearly satisfied from the evidence that Samuel C. Young is the son & heir of Samuel Young, then they should find for the def'ts. Rejected.

No. 3. The court further instructs the jury that the recital in Samuel C. Young['s] deed to John Holmes, that he is the only heir of Samuel Young, is of itself, and considered alone, no evidence that he is the heir of Samuel Young. Rejected.

No. 4. The court further instructs the jury that if they believe from the evidence that the land in the 3,000-acre patent of Samuel Young was not registered for taxation on the books of the commissioner of the revenue of Lee Co. on or before the 1st day of Nov., 1836, and tho' charged same with back taxes due thereon, and damage prescribed by law, and that said back taxes and damages were then paid, except such taxes as has been released by the State, then the land was forfeited to the State, and the plaintiff cannot
116 recover them in this action, and the jury must find for the defendant. Rejected because not pertinent.

No. 5. The court further instructs the jury that if they find from the evidence that the lands included in the boundaries of Samuel Young's 3,000-acre patent now claimed by the plaintiffs were not, on or before the 1st day of July, 1883, placed on the commissioners' books of Lee county for taxation and charged with all the back taxes and damages due thereon not theretofore released by the State, and such taxes then actually paid, that then said lands became forfeited to the State; and if the jury further believe, from the evidence, that the defendants claim under a patent to Peter Fulkerson, Sr., dated October 30th, 1838, for 240 acres, and a patent to James Fulkerson, Frederick D. Fulkerson, and Elizabeth Fulkerson, dated the 31st day of October, 1846, for 500 acres, and that the said 240-acre and 500-acre patents cover lands in said Young's 3,000-acre patent, and that the defendants, and those they claim under, have duly paid all taxes chargeable on said 240 and 500 acres of land, that then Young's title to the extent of the land included in said 240-acre and 500-acre patent to said Fulkerson vested in the owners of the 240 & 500 acre patents, and the jury must find for the defendants. Instruction refused, & court refuses to give any other, because not pertinent to the case.

No. 6. The court further tells the jury that if they find from the evidence that the land in the 3,000 acres survey ever was for-
117 feited, that then, before the plaintiffs have a right to recover, they must satisfy the jury that the said lands have been redeemed or released from forfeiture pursuant to the laws of Virginia passed on that subject. Rejected — not pertinent.

No. 7. The court further instructs the jury that if they believe from the evidence that the defendants, or either of them, and those the def'ts claim under, have had continuous, uninterrupted adversary possession of the *the* land in their respective possession, claiming it as their own under color of title to themselves for ten years, not computing time during stay law or covered by disability of any def't before the plaintiff began this suit, then the law is for such defendants thus having possession and holding, and they must find for the defendants so holding. Stay law began April 17, '61, & runs to Jan'y 1st, 1869.

No. 8. If the jury find from the evidence that John Holm-s was tenant, by the courtesey of Margaret Holmes' — fourth part of said land, and that the defendants, and those who claim under them, held the uninterrupted adversary possession of said lands, claiming them as their own under color of title for ten years before Mrs. Margaret Holmes' death, then her children cannot recover her one-fourth until after the death of John Holmes, her husband, & the jury must find for the def'ts as to that land. Rejected.

No. 8½. The court instructs the jury that if they believe
118 from the evidence that John Holmes and Mary Margaret Holmes were married; that they had issue born alive; that they were seized during the coverture of the land in controversy; that said Mary Margaret was dead, and that John Holmes was living at the — institution of this suit, then said John Holmes was a tenant by the courtesy —. Rejected.

No. 9. If the jury believe, from the evidence, that John Holmes is tenant by the curtesy of Mary Margaret Holmes' one-fourth interest in said land, then Mary Margaret's children cannot recover her interest until John Holmes' death. Rejected.

No. 10. The court further instructs the jury that if they find, from the evinence, that Annie Isabella Holmes was a daughter of Mary Margaret Holmes, and died after her said mother, and that she was twenty-one years old, that then her brothers and sisters are not heirs, but that her father is, and that they cannot recover her one-fourth of the lands claimed by Mary Margaret Holmes, and that jury must find for the defendants as to her fourth, of Mary Margaret's fourth. Given as amended.

119 The plaintiff objected to said instructions. The court gave instructions numbered "2" & "7," but refused to give any of the other instructions, or to give any instructions in lieu of them, or of any of them, except No. 10. The court amended No. 10 and gave it in the words and figures following:

The court gives 10th instruction of def'ts, with this addition:

"But if the jury shall be satisfied that the entry and possession of def'ts, or of those under whom they claim, was never adversary in its character, but, on the contrary, was an acknowledgment of plaintiff's title, then it is not competent for the def'ts in this action to defend themselves by this outstanding title in the father."

To all of which action of the court in refusing to give said instructions, or any of them, in refusing to give any instructions in lieu thereof, and in giving said 10th instruction as amended, the defendants except, and to save the benefit thereof file this their bill of exceptions, and pray that it may be signed, sealed, and made part of the record, which is done.

The jury then retired and afterwards brought in a verdict in the words and figure following: See page 14.

The defendants thereupon moved the court [to] set aside
120 said verdict and grant them a new trial, because the court erred in admitting illegal testimony, in giving erroneous instructions, and in refusing to give correct instructions, but the court overruled said motion and refused to grant a new trial, to which action of the court the defendants except, and to save the benefit thereof pray that this their bill of exceptions may be signed, sealed, and made a part of the record, which is done. And reference is expressly made in each bill of exceptions to each and every other bill and to the whole record.

ALEX'R RIVER. [SEAL.]

121 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the western district of Virginia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between Seth C. Holmes, Anna Isabella Holmes,

Harriet A. Holmes, William J. Holmes, Edward C. Holmes, William Holmes & Elizabeth, his wife Annie Holmes, Helen P. Holmes, John Holmes, and William S. Whitely and Elizabeth E., his wife, formerly Elizabeth E. Holmes (children & heirs of John Holmes, Sr., deceased), plaintiffs, and W. Whitehill Fulkerson, Margaret Fulkerson, Lee S. Fulkerson, Napoleon E. Beatie, Samuel M. Beatie, William H. Beatie, John S. Beatie, Cornelia J. Beatie, Burgoyne Beatie, Charles E. Baylor and Hattie, his wife Judson Hatcher and Emily, his wife Charles Daugherty, Christey Brunk, Joseph Mintic, James Graybeal, John Edmondson, Frank Edmondson, Jehu Green, and William O'Neal, defendants, a manifest error hath appeared, to the great damage of the said defendants, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceeds aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 21st day of October, in the year of our Lord one thousand eight hundred and eighty-two.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
M. R. WAITE,
Chief Justice U. S.

[Endorsed in pencil:] (Original.) To be attached to record.

122 United States of America, to Seth C. Holmes, Anna Isabella Holmes, Harriet A. Holmes, William J. Holmes, Edward C. Holmes, William Holmes and Elizabeth, his wife, Anna Holmes, Helen P. Holmes, John Holmes and William S. Whitely and Elizabeth E., his wife, formerly Elizabeth E. Holmes, children and heirs of John Holmes, Sr., deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western district of Virginia, wherein W. Whitehill Fulkerson, Margaret Fulkerson, Lee S. Fulkerson, Napoleon E. Beatie, Samuel M. Beatie, William H. Beatie, John S. Beatie, Cornelia J. Beatie, Burgoyne Beatie, Charles E. Baylor and Hattie, his wife, Judson Hatcher

and Emily, his wife, Charles Daugherty, Christey Brunk, Joseph Mintic, James Graybeal, John Edmondson, Frank Edmondson, Jehu Green and William O'Neal are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this twenty-first day of October, in the year of our Lord one thousand eight hundred and eighty-two.

M. R. WAITE,
Chief Justice U. S.

123 On this 25th day of October, in the year of our Lord one thousand eight hundred and eighty-two, personally appeared John A. Buchanan before me, the subscriber, and makes oath that he delivered a true copy of the within citation to Messrs. Campbell and Trigg, attorneys for the defendants in error named in the within citation.

JOHN A. BUCHANAN.

Sworn to and subscribed the 25th October, A. D. 1882.
[Seal United States Circuit Court, Western District of Virginia.]
B. GILDERSLEEVE, *Clerk.*

[Endorsed in pencil:] (Original.) Proof of service to be endorsed on this & then to be attached to record.

124 Know all men by these presents that we, Thomas W. White and V. H. Thomas, are held and firmly bound unto Seth C. Holmes, Ann I. Holmes, Harriet A. Holmes, Wm. J. Holmes, Edward C. Holmes and Elizabeth, his wife, Annie Holmes, Helen P. Holmes, Wm. S. Whitely and Elizabeth, his wife, in the full and just sum of five hundred dollars, to be paid to the said Seth C. Holmes, Ann I. Holmes, and the other parties named above and their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this (19th) the nineteenth day of October, in the year of our Lord one thousand eight hundred and eighty-two.

Whereas lately at a circuit court of the United States for the western district of Virginia, in the fourth circuit, at Abingdon, Virginia, in a suit depending in said court between the said Seth C. Holmes, Ann I. Holmes, Harriet A. Holmes, Wm. J. Holmes, Edward C. Holmes and Elizabeth, his wife, Annie Holmes, Helen P. Holmes, Wm. S. Whitely and Elizabeth E., his wife, plaintiffs, and W. W. Fulkerson, Margaret Fulkerson, Lee S. Fulkerson, N. E. Beatie, S. M. Beatie, W. H. Beatie, J. S. Beatie, C. J. Beatie, Burgoyne Beatie, C. E. Baylor & Hattie, his wife, Judson Hatcher and Emily, his wife; Chas. Daugherty, Christey Brunk, Joseph Mintic, James

Graybeel, John Edmondson, Frank Edmondson, Jehu Green,
125 Wm. O'Neal, defendants, a judgment was rendered against the said defendants, and the said defendants, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation, directed to the said Seth C. Holmes and others, defendants in error, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said W. W. Fulkerson and other- named above, plaintiffs in error, shall prosecute their said writ of error to effect and answer all damages and costs if they shall fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

THOS. W. WHITE. [SEAL.]
V. H. THOMAS. [SEAL.]

Sealed and delivered in presence of—

——— ———.

Approved by—
M. R. WAITE,
Chief Justice U. S.

UNITED STATES OF AMERICA,
Western District of Virginia, City of Abingdon, } *ss:*

Thos. W. White and V. H. Thomas, of Abingdon, in said
126 district, on the within bond, being duly sworn, did each depose and say that he was worth the sum of five hundred dollars over and above all his just debts and liabilities, in property subject to execution and sale.

Sworn to and subscribed in my presence this 19th day of October, A. D. 1882.

B. GILDERSLEEVE,
Clerk C. C. U. S., W. D. of Virginia.

127 WESTERN DISTRICT OF VIRGINIA,
CLERK'S OFFICE, CIRCUIT COURT UNITED STATES.

I, B. Gildersleeve, clerk of the said court, do certify that the foregoing is a true and correct copy of the record and proceedings of said court in the case of Holmes' Children and Heirs, plaintiff-, against W. W. Fulkerson and others, defendants.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 25th day of October, A. D. 1882.

[Seal United States Circuit Court, Western District of Virginia.]

B. GILDERSLEEVE,
Clerk Circuit Court.

Fee-:

For copy, 312 folios, @ 15 --	$46 80
Oath, &c., to W. of E-------	45
Seal & certificate to record--	35
	$47 60

128 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the western district of Virginia, Greeting:

[Seal of the Supreme Court of the United States.]

Whereas in a certain suit in said circuit court between Seth C. Holmes, Anna Isabella Holmes, Harriet A. Holmes, William J. Holmes, Edward C. Holmes, William Holmes and Elizabeth, his wife, Annie Holmes, Helen P. Holmes, John Holmes, and William S. Whiteley, and Elizabeth E., his wife, formerly Elizabeth E. Holmes (children and heirs of John Holmes, Sr., deceased), plaintiffs, and W. Whitehill Fulkerson, Margaret Fulkerson, Lee S. Fulkerson, Napoleon E. Beatie, Samuel M. Beatie, *et al.*, defendants, which suit was
129 removed to the Supreme Court of the United States by virtue of a writ of error agreeably to the act of Congress in such case made and provided, a diminution of the record and proceedings of said cause has been suggested, to wit:

"That the plea of the defendants filed in the court below to the amended declaration of the plaintiffs has been omitted from the said transcript of record:"

You, therefore, are hereby commanded that, searching the record and proceedings in said cause, you certify what omissions to the extent above enumerated you shall find to the said Supreme Court of the United States, so that you have the same, together with this writ, before the said Supreme Court forthwith.

Witness the Honorable Morrison R. Waite, Chief Justice
130 of said Supreme Court, the 28th day of May, A. D. 1884.

JAMES H. McKENNEY,
Clerk Supreme Court U. S.

131 In the clerk's office of the Circuit Court of the United States of America for the Western District of Virginia, at Abingdon.

Whereas it is made known to me as clerk of this court that it has been suggested there is a diminution of the record, as copied and certified from this court to the Supreme Court of the United States of America, in the case of Seth C. Holmes and others against W. W. Whitehill Fulkerson and others, in this:

"That the plea of the defendants filed in the court below to the amended declaration of the plaintiffs has been omitted from said transcript of record:"

Now, therefore, these are to certify that at another day, to wit:

At a circuit court of the United States continued and held for the western district of Virginia, at Abingdon, on Saturday, 28 October, 1876.

HOLMES' CHILDREN & HEIRS *et als.*
against
W. W. FULKERSON *et al.*

132 This day came the parties, by their attorneys, and by consent the continuance entered in this cause on Tuesday last

is set aside, and by like consent leave is given the plaintiffs to file an amended declaration in this cause, and the said amended declaration being filed the defendants pleaded not guilty, to which the plaintiffs replied generally, and, issue being joined thereon, this cause is continued.

I hereby certify that the foregeing is a true and correct copy of the order entered in the foregoing cause in this court on the 28 day of October, 1876, suggested as an omission in the transcript of the record from this court to the said Supreme Court of the United States as aforesaid.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Abingdon, in said district, this 8th day of June, A. D. 1884.

[Seal United States Circuit Court, Western District of Virginia.]

J. C. FOWLER, *Clerk.*

133 [Endorsed:] Supreme Court U. S. 1884, October term. No. 434. W. Whitehall Fulkerson & *al.*, pl'ffs in error, *vs.* Seth C. Holmes *et al.* Writ of certioraria & return. [Stamped:] Office Supreme Court U. S. Filed Jul- 10, 1884. James H. McKenney, clerk.

Endorsed on cover: Virginia, western district, C. C. U. S. No. 160. W. Whitehall Fulkerson, Margaret Fulkerson, Lee S. Fulkerson, Napoleon E. Beatie, *et al.*, plaintiffs in error, *vs.* Seth C. Holmes, Anna Isabella Holmes, Harriet A. Holmes, William J. Holmes, *et al.* Filed 2nd November, 1882.

Office Supreme Court U. S.
FILED.
JAN 25 1886
JAMES H. McKENNEY.
CLERK.

IN THE

Supreme Court of the United States.

W. WHITEHILL FULKERSON and others, *Plaintiffs in Error*,
vs.
SETH C. HOLMES and others, *Defendants in Error.*

Brief of Counsel of Plaintiffs in Error, on motion to dismiss writ of error for want of jurisdiction.

The grounds of the said motion to dismiss are—

1st. That the said writ of error is not to any final judgment in the cause.

2d. That the matter in dispute is of less value than $5,000.

I. That the judgment is final is clear from its very terms. The defendants in error brought an action of ejectment in the court below to recover a tract of 3,000 acres of land. A verdict was rendered in their favor; upon this verdict judgment was given against the plaintiffs in error, writ of possession awarded for the whole land, and the whole case disposed of by the court below. (Rec. pp. 7–8.)

But it is claimed, that the judgment to which the writ of error was taken out, was a judgment in which all the defendants in error were plaintiffs, and all the plaintiffs in error were defendants, whilst the judgment rendered was not *one* but *four* judgments.

It is true that there were four sets of tenants in common mentioned in the declaration, that each set received an undivided fourth of the land in controversy, and that a writ of possession was awarded for each fourth part. But this did not make four judgments. The verdict found that each set of tenants in common was entitled to one undivided fourth part of the land, and the judgment rendered followed the verdict. It is not pretended that there were four verdicts; in fact, it is admitted that there was but one verdict. (See brief of

counsel for defendants in error, page 3.) "The jury," says the brief, "rendered their *verdict* on said amended declaration, (Rec. p. 7,) finding for the plaintiffs in each count one undivided fourth part in fee of the premises in said declaration."

Such a judgment, giving one fourth of the recovery made to each set of defendants, no more makes four judgments than a decree in favor of four distributees, giving to each a fourth of the amount found to be due from the administrator of a decedent's estate, and giving each an execution therefor, makes four decrees.

In the case of Shields *vs.* Thomas, 17 Howard, 3–4, this court held, that where several distributees of a decedent's estate filed a bill against the personal representative of that estate, and a decree was rendered in their favor, giving to each distributee his share of the recovery, the whole amount recovered being over $2,000, the personal representative had the right to an appeal, though the amount decreed in favor of each distributee was less than $2,000.

The decree in that case was but *one decree*, although the sum recovered from the defendant was divided among the plaintiffs according to their respective interests.

Is it not then clear that the judgment in this case is but one judgment, although the recovery made from all the defendants was divided among the plaintiffs according to their respective interests?

II. Was the matter in dispute of less value than $5,000?

The record shows that the tract of land, which the action was brought to recover, cost $10,400, (Rec. p. 10,) and that its assessed value was $6,000. (Rec. pp. 52–53.) This is all the evidence of value in the record. Taking either of these sums, and the matter in dispute is of greater value than $5,000. But it is said that the value of the whole matter in controversy is not the test by which the jurisdiction of this court is to be determined, but that one-fourth of that value, or the value of the recovery of each set of heirs, is the true test.

In the case of Shields *vs.* Thomas, 17 How. 3–4, cited above, this court held, that "where a bill was filed by several distributees of an estate to compel the payment of money alleged to be due them, and a decree was rendered in their favor, this court had jurisdiction, although the amount payable to each individual claimant was less than $2,000." The court in that case said the matter in controversy was the amount due the *distributees collectively*, and not the sum to which each was entitled when the sum was distributed among them.

"They all claimed," said the court, "under *one* and the *same title.* They had a *common* and *undivided* interest in the claim, and it was perfectly immaterial to the appellant how it was to be shared among them." "It is like a contract with several to pay a sum of money. It may be that the money, when recovered, is to be divided in equal or unequal proportions. Yet, if there is a controversy on the contract, and the sum in dispute upon it exceeds $2,000, an appeal would clearly lie to this court, although the interest of each individual was less than that sum." Same case, page 5, the same doctrine is laid down in the case of "The Connemera," 103 U. S. 754–6, and the case of Shields *vs.* Thomas is cited with approval.

In the case of the Farmers' Loan & Trust Co. *vs.* Watterman, 106 U. S. 265–270, this court held, that "if the controversy is about a matter in which several parties are *interested collectively under a common title*, and in the decree, after establishing the common right, a division is made among the claimants according to their respective interests, the separation of the decree into parts will not prevent an appeal."

In Friend *vs.* Wise, 111 U. S. 797, this court held that where the complaint or declaration alleges a joint entry and ouster, and the denial or plea was general, and the judgment was against all jointly for the recovery of the possession of the land, a writ of error would lie where the whole land in controversy was of greater value than $5,000.

The recovery in this case was upon the amended declaration, and is so admitted in the brief of counsel for defendants in error. (See brief, p. 3.) That declaration alleged a joint entry and ouster. (Rec. p. 5.) All the defendants in error pleaded a joint plea of not guilty, and all the defendants in error jointly replied generally to that plea. (Rec. p. 3.)

The defendants in error all claimed under one and the same title, (Rec. p. 9,) had a common and undivided interest in the said land, and recovered the whole tract from all the plaintiffs in error jointly. (Rec. pp. 7–8.)

The decisions cited show conclusively the right of the plaintiffs in error to a writ of error in this case.

But it is claimed that only a part of the said tract of land was in controversy, that said part in controversy was of less value than $5,000, and that the plaintiffs in error were not jointly interested in said tract of land. The record shows that the whole tract was in controversy, and that the defence of the defendants in error *was joint* and *not several.* The defendants in error are estopped from setting

up any such claim. *They sued for the whole tract*, they *got* a *verdict, judgment*, and *writ* of *possession for the whole tract*, against all the *defendants in error jointly*. They will not be permitted to say now, to defeat the jurisdiction of this court, that their claim was not true, that their recovery was improper, and that their verdict and judgment were not in accordance with the pleadings and proofs in the cause.

It is respectfully submitted that the motion to dismiss should be overruled.

38461

John A. Buchanan.

Office Supreme Court U. S.
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JAMES H. McKENNEY.
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117-389

In the Supreme Court of Appeals of Virginia.

W. WHITEHILL FULKERSON AND OTHERS
vs.
SETH C. HOLMES AND OTHERS.

Brief of Counsel for Plaintiffs in Error.

37942

In the Supreme Court of Appeals of Virginia.

W. Whitehill Fulkerson and others
vs.
Seth C. Holmes and others.

Brief of Counsel for Plaintiffs in Error.

At the August rules, 1871, the heirs of John Holmes, Sr., the defendants in error, instituted an action of ejectment against W. Whitehill Fulkerson and others, plaintiffs in error, in the Circuit Court of the United States for the Western district of Virginia, at Abingdon, to recover a tract of three thousand acres of land, in the possession of the said plaintiffs in error.

At the October term, 1876, of said court, the said defendants in error filed an amended declaration, to each of which declarations the plaintiffs in error pleaded "not guilty."

The cause was continued until the October term, 1880, of said court, when it was tried, and a judgment obtained by the said defendants in error by which they recovered from said plaintiffs in error the said tract of land.

The defendants in error, to sustain the issue upon their part and to make out their claim of title, read in evidence, among other things, a grant from the Commonwealth of Virginia to one Samuel Young, dated the 7th day of May, 1787, for a tract of three thousand acres of land (Record, p. 9). They then offered to read in evidence a deed, dated July 12, 1819, from one Samuel C. Young to John Holmes, Sr., conveying the same land, in which it is recited that Samuel Young died intestate, and that the said Samuel C. Young is his only child and heir, and that said land, with its appurtenances, had vested in him, the said Samuel C. (Record, pp. 10, 11); to the reading of which the plaintiffs in error objected, because there was no evidence showing that the said Samuel Young was dead, or that the said Samuel C. Young was his heir, or that the deed offered was the deed of Samuel C. Young (Rec., p. 12). The defendants in error, to sustain their offer to read said deed, which purported to have been acknowledged before Judge Peters, of the District Court of the United States for the district of Pennsylvania, and to have been witnessed by John Shaw and John Craige, proved the handwriting of Judge Peters and the death of John Shaw, and that the said grant and deed were found among the

papers of said John Holmes when he died, in 1834. They also offered evidence tending to prove that said Holmes' son-in-law went to the land in 1836 or 1837 and examined it, and that some of those through whom the plaintiffs in error claimed did not then claim the land, and that they afterwards wished to buy part of it from the heirs of Jno. Holmes, Sr. (Rec., pp. 12–23); but no evidence was offered by them showing that Samuel Young, Samuel C. Young, or John Holmes, Sr., ever had possession of said land. The court overruled said objections, and permitted said deed to be read; to which action of the court the plaintiffs in error excepted, and filed their bill of exceptions (Rec., pp. 23, 24).

The plaintiffs in error, to sustain the issue on their part, among other evidence showing their title and right to the possession of said land, offered evidence tending to prove that the said tract of land had never been entered upon the commissioner's books for taxation, as required by law, and that the taxes had never been paid (Rec., pp. 49, 50), and it was therefore forfeited under the laws of the Commonwealth.

The defendants in error, in rebuttal, offered evidence tending to show that they had redeemed said land from forfeiture by having said land placed upon the land books, and the damages assessed thereon (Rec., pp. 50–54).

The court, upon the motion of the defendants in error, gave the following instructions to the jury, to wit:

No. 1. The court instructs the jury that if they believe from the evidence in this cause that the Commonwealth, by letters patent, on the 7th day of May, 1787, granted to Samuel Young the parcel of 3,000 acres of land in the declaration mentioned; that Samuel C. Young was the only child and heir of Samuel Young; that Samuel C. Young conveyed the said 3,000 acres by deed of the 12th day of July, 1819, to John Holmes, of the city of Philadelphia, Penn.; that said John Holmes is dead, and that the plaintiffs are his heirs, then the title to this land is satisfactorily traced to the plaintiffs, and that in consequence of the antiquity of the deed of Samuel C. Young to John Holmes of 12th July, 1819, and its custody by said Holmes, the jury may be justified by the testimony tending to prove an acknowledgment of this title by those under whom defendants claim to accept the recitals of said deed as to the heirship of Samuel C. Young.

Plaintiffs' Second Instruction.

2. The junior patents to Peter and James Fulkersen were admitted in evidence, not as proofs of title in defendants, but merely to estab-

lish a color of title by which the defendants might rely on the defense of an adversary possession for the time prescribed by the statute of limitations; but to sustain this defense the jury are instructed that the defendants must prove an adversary and hostile possession, an entry with claim of title, and an actual intent to hold against the original patentee and the claimants under him; and if the jury shall believe that the entry of those under whom defendants' claim was made in knowledge of and in subordination to plaintiffs' title, such entry and possession cannot be construed as adversary or as constituting a valid defense under the statute of limitations; but if, after the original entry and possession, the parties chose to convert it into an adversary possession, by virtue of which they could perfect a title by lapse of time, it is incumbent upon them to prove to the satisfaction of the jury that they disclaimed the character of their original entry and possession, and gave notice to the plaintiffs of their claim to hold the land adversely under claim of title in themselves; and in the absence of such proof the jury will be warranted to believe that the entry and possession continued as both commenced.

To the giving of these instructions the plaintiffs in error objected, and filed their bill of exceptions (Rec., p. 55).

The plaintiffs in error moved the court to give the following instructions among others, to wit:

No. 2½. The court further tells the jury that the recitals in the deed of Samuel C. Young, that he is the only heir of Samuel Young, has been permitted to be read to the jury as evidence; yet it is left to the jury to decide from all the facts and circumstances in evidence before them whether Samuel Young is dead or not, and whether Samuel C. Young is his only son and heir or not, and unless they should be clearly satisfied from the evidence that Samuel C. Young is the son and heir of Samuel Young, then they should find for the defendants. Rejected.

No. 3. The court further instructs the jury that the recital in Samuel C. Young['s] deed to John Holmes, that he is the only heir of Samuel Young, is of itself, and considered alone, no evidence that he is the heir of Samuel Young. Rejected.

No. 4. The court further instructs the jury that if they believe from the evidence that the land in the 3,000-acre patent of Samuel Young was not registered for taxation on the books of the commissioner of the revenue of Lee county on or before the 1st day of November, 1836, and the same charged with back taxes due thereon, and damage prescribed by law, and that said back taxes and damages were then paid, except such taxes as has been released by the State, then the land was

forfeited to the State, and the plaintiff cannot recover them in this action, and the jury must find for the defendant. Rejected because not pertinent.

No. 5. The court further instructs the jury that if they find from the evidence that the lands included in the boundaries of Samuel Young's 3,000-acre patent now claimed by the plaintiffs were not, on or before the 1st day of July, 1838, placed on the commissioners' books of Lee county for taxation and charged with all the back taxes and damages due thereon not theretofore released by the State, and such taxes then actually paid, that then said lands became forfeited to the State; and if the jury further believe, from the evidence, that the defendants claim under a patent to Peter Fulkerson, Sr., dated October 30th, 1838, for 240 acres, and a patent to James Fulkerson, Frederick D. Fulkerson, and Elizabeth Fulkerson, dated the 31st day of October, 1846, for 500 acres, and that the said 240-acre and 500-acre patents cover lands in said Young's 3,000-acre patent, and that the defendants, and those they claim under, have duly paid all taxes chargeable on said 240 and 500 acres of land, that then Young's title to the extent of the land included in said 240-acre and 500-acre patent to said Fulkerson vested in the owners of the 240 and 500-acre patents, and the jury must find for the defendants. Instruction refused, and court refuses to give any other, because not pertinent to the case.

No. 6. The court further tells the jury that if they find from the evidence that the land in the 3,000-acres survey ever was forfeited, that then, before the plaintiffs have a right to recover, they must satisfy the jury that the said lands have been redeemed or released from forfeiture pursuant to the laws of Virginia passed on that subject. Rejected—not pertinent.

No. 7. The court further instructs the jury that if they believe from the evidence that the defendants, or either of them, and those the defendants claim under, have had continuous, uninterrupted adversary possession of the *the* land in their respective possession, claiming it as their own under color of title to themselves for ten years, not computing time during the stay law or covered by disability of any defendant before the plaintiff began this suit, then the law is for such defendants thus having possession and holding, and they must find for the defendants so holding. Stay law began April 17, '61, and runs to January 1st, 1869.

But the court refused to give them, or any others in lieu of them, or in lieu of any of them. To this action of the court the plaintiffs in error excepted, and filed their bill of exceptions (Rec., pp. 55–57).

After the verdict was rendered, the plaintiffs in error moved the

court to set it aside, and grant them a new trial: because the court had erred in admitting illegal testimony, in giving erroneous instructions, and in refusing to give correct instructions. This the court refused to do, and gave judgment for the defendants in error. To this action of the court the plaintiffs in error excepted, and filed their bill of exceptions (Rec., p. 57):

I. It was error in the court to allow said deed to be read in evidence without instructing the jury that the recitals therein as to the death of Samuel Young and the heirship of Samuel C. Young was not evidence against the plaintiffs in error, even if it were admissible at all, without proof of its execution, or of possession, accompanying and held under it.

The said recitals in the deed were clearly inadmissible:

1. Because such recitals are not evidence of the facts recited as to third persons, who do not claim under, but adversely to the title which the deed purports to convey. (Wiley vs. Givens, 6 Grat., 277, 286.)

2. Such recitals could not be received as evidence of pedigree, because the relationship of Samuel C. Young, the declarant, to Samuel Young was not established; and it was not shown that the declarant was dead. These two facts must be shown by evidence independent of the recitals. (Blackford vs. Crawford, 3 Wal., 175, 187; 1 Wharton's Evidence, sec. 218, and cases cited; 2 Starkie, 205, and note; Gregory vs. Baugh, 4 Rand., 329; Chapman vs. Chapman, 2 Conn. Rep., 347; Fort vs. Clarke, 1 Russell, 601, 604; Speed vs. Brooks, 3 J. J. Marshall, 119.)

These recitals were made by Samuel C. Young in his own interest, and upon no principle of law can such acts be evidence in favor of those who claim under him, to establish the facts stated in the recitals as against these persons. (Edwards vs. Ballard, 16 Ben. Monroe, 289, 290.)

The error committed by allowing the said deed to be read in evidence was repeated by the court in giving instruction No. 1 offered by defendants in error, and in refusing to give instructions Nos. 2½ and 3 asked for by plaintiffs in error (Rec., pp. 54, 55). In giving the said instruction No. 1, and in refusing to give the said instructions Nos. 2½ and 3, the court decided that the recital in said deed, as to the heirship of said Samuel C. Young, was legal evidence, when, as above shown, such was not the case.

II. The court erred in refusing to instruct the jury upon the question of forfeiture.

Under the provisions of the statutes of Virginia, passed from time

to time, it was the duty of the owners of land to pay all the taxes properly chargeable thereon, and where they had been omitted from the books of the commissioners of the revenue, it was their duty to cause them to be entered thereon in the proper counties, and to be charged with all arrearages of taxes and damages, and to pay all such arrearages, not relieved, and in case of failure so to do, forfeiting to the commonwealth all right and title whatever of the parties in default; and these statutes themselves, of their own force and by their own energy, worked out their own purpose, divesting the title of the defaulting owner, and perfectly vesting it in the commonwealth, and thus consummating and perfecting such forfeiture without the machinery of any proceedings of record, or anything in the nature of an inquest of office. (Wild's Lessee vs. Serfall, and cases there cited, 10 Grat., 405, &c.)

See extracts from statutes of Virginia, as to delinquent lands.

ACTS 1834–'5—CH. XIII, PAGE 12, SEC. 2.

Be it therefore further enacted, That each and every owner or proprietor of any such tract or parcel of land shall, on or before the first day of July, eighteen hundred and thirty-six, enter or cause to be entered on the books of the commissioners of the revenue for the county wherein any such tract or parcel of land may lie, all such lands now owned or claimed by him, her or them, through title derived mediately or immediately under grants from the commonwealth, and have the same charged with all taxes and damages in arrear or properly chargeable thereon, and shall also actually pay and satisfy all such taxes and damages which would not have been relinquished and exonerated by the second section of the act concerning delinquent and forfeited lands, passed March tenth, eighteen hundred and thirty-two, had they been returned for their delinquency prior to the passage of that act; and upon their failure to do so, all such lands or parcels thereof not now in the actual possession of such owner or proprietor by himself, or his tenant in possession, shall become forfeited to the commonwealth after the first day of July, eighteen hundred and thirty-six, except only as hereinafter excepted.

Sec. 16. This act shall be in force from and after the passing thereof. (Passed February 27, 1835.)

ACTS 1835–'6—CH. III, PAGE 7.

An act concerning delinquent lands and land not heretofore entered on the commissioner's books. Passed and went into effect March 23, 1836.

* * * * * * * *

§ 1. Be it therefore enacted, That further time, until the first day of November, eighteen hundred and thirty-six, shall be allowed to all persons to cause their omitted lands to be entered with the commissioner of the revenue, and to pay the taxes thereon, in the manner prescribed in the second section of the above recited act, which passed on the twenty-seventh of February, eighteen hundred and thirty-five; and the said section shall not be construed to apply to any lands or lots which may have been omitted since eighteen hundred and thirty-one.

Acts 1836-'7—Ch. VIII, Page 9.

An act to amend and explain the laws concerning Western land titles and for other purposes. Passed and went into effect March 30, 1837.

§ 1. Be it enacted by the General Assembly, That all persons whose lands have been forfeited to the literary fund, either for the non-payment of the taxes charged thereon, or for failure to enter them on the books of the commissioner of the revenue, may redeem their said land at any time before the fifteenth day of January next, by paying into the treasury of the commonwealth the amount of taxes charged thereon, with damages at the rate of ten per centum per annum from the time they became due, or in case of forfeiture for failure to enter any lands with the commissioner of the revenue, the owner may redeem them by causing such lands to be entered with the commissioner of the revenue or the sheriff of the county in which such lands are situate, and having the same charged, with all arrearages of taxes chargeable thereon, and by paying such arrearages and damages thereon, at the rate of ten per centum per annum, into the treasury of the commonwealth before the fifteenth day of January next: provided that such redemption shall in nowise affect the claim or title of any bona fide occupant claiming under a prior grant, whose rights are protected and secured under the provisions of the several acts which have heretofore passed upon the same subject, and are now in full force.

Acts Va. 1838—Ch. VIII., Pages 16, 17.

Delinquent Lands—Western Titles.

An act to amend an act entitled "An act to amend and explain the laws concerning western land titles, and for other purposes." Passed March 15, 1838.

1. Be it enacted by the General Assembly, That all persons whose lands have been forfeited for the non-payment of taxes charged thereon, or for the failure to enter them on the books of the commissioners

of the revenue, shall have a further time, until the first day of July next, to redeem the same by paying into the treasury of the commonwealth, or to the sheriff of the county where they lie, as hereinafter provided, the amount of taxes charged, and damages thereon at the rate of six per centum per annum; and in case of forfeiture by failure to enter as aforesaid, by causing such lands to be entered on the books of the commissioners as aforesaid, and having the same charged with all arrearages of taxes chargeable thereon, and paying such taxes and damages thereon, at the rate of six per centum per annum, into the treasury, or to the sheriff as aforesaid: provided that such redemption shall in no wise affect the claim or title of any bona fide occupant whose riglits are protected and secured by any pre-existing law.

The plaintiffs in error offered evidence tending to show such forfeiture by reason of the failure of those under whom the defendants in error claim to have said land entered upon the commissioner's books for taxation, and by reason of their failure to pay the taxes and damages assessed therein (Rec., 49, 50). The certificate of the auditor shows that no such land was ever on the said books in the name of Samuel Young, that no land at all was ever charged to Samuel C. Young, and none to John Holmes, prior to 1838.

The defendants in error offered, in rebuttal, evidence for the purpose of showing that said land had been redeemed from forfeiture by having it placed upon the land books and assessed with taxes and damages (Rec., pp. 50–54). Thus the question of forfeiture was distinctly raised, yet the court refused to give the instructions asked for (Nos. 4, 5, and 6), or any others in lieu thereof, not because the instructions asked for were erroneous in themselves, but because they were not pertinent to the case (Rec., pp. 55, 56).

The court erred not only in refusing to give the instructions asked for by the plaintffs in error, but also in giving instruction No. 2 of defendants in error, in which the question of forfeiture is ignored.

The forfeiture, it is maintained, was clearly shown; but if it were not, there was evidence tending to show it, and it was the plain duty of the court, in such a case, to instruct the jury upon that question. (Farish vs. Reagle, 11 Grat., 719; Early vs. Garland, 13 Grat., 1–14; Hopkins vs. Richardson, 9 Grat., 486–496.)

For these errors, it is respectfully submitted that the judgment complained of should be reversed and a new trial awarded.

John A. Buchanan

117-381

NOTICE AND BRIEF OF DEFENDANTS IN ERROR TO DISMISS WRIT OF ERROR FOR WANT OF JURISDICTION.

In the Supreme Court of the United States.

W. WHITEHILL FULKERSON, AND OTHERS,
Plaintiffs in Error

vs.

SETH C. HOLMES, AND OTHERS.

Brief of John A. Campbell, for Defendants in Error.

JOHN A. CAMPBELL,
Counsel for Defendants in Error.

In the Supreme Court of the United States.

W. Whitehill Fulkerson, Margaret Fulkerson, Lee S. Fulkerson, Napoleon E. Beatie, et al., plaintiffs in error,

vs.

Seth C. Holmes, Anna Isabella Holmes, Harriet A. Holmes, William J. Holmes, et als., defendants in error, to the Circuit Court of the United States for the Western District of Virginia:

Notice of a motion to be submitted by the defendants in error in said case by their attorneys, on the 25th day of January, 1886, to dismiss the writ of error of the plaintiffs in said case, for want of jurisdiction.

You, W. Whitehill Fulkerson, Margaret Fulkerson, Lee S. Fulkerson, Napoleon E. Beatie, Samuel M. Beatie, William H. Beatie, John S. Beatie, Cornelia J. Beatie, Burgoyne Beatie, Charles E. Baylor and Hattie his wife, Judson Hatcher and Emily his wife, Charles Dougherty, Christey Brunk, Joseph Mintick, James Graybeal, John Edmondson, Frank Edmondson, Jehu Green and William O'Neal, plaintiffs in error in the above case, will take notice that we, the defendants in error in said case, will, on Monday, the 25th day of January, 1886, move the said court to dismiss your writ of error;

First, Because the writ of error taken out by you is not to any final judgment rendered in said case;

Second, Because the matter in dispute does not exceed the value of $5,000.

FACTS.

This is a writ of error sued out by the defendants in the court below to bring to this court the record of an action of ejectment, in which the plaintiffs in error were defendants, and the defendants in error were plaintiffs. There were two declarations filed in the case. The original declaration, record page 1, consisted of one count, of all of the plaintiffs against all of the defendants.

To this the defendants appeared by their attorneys on the 24th of Oct., 1871, and plead that "they are *severally* not guilty in manner and form as the plaintiffs against them have alleged, and of this they *severally* put

themselves upon the country"—Record, page 2. On the 28th of October, 1876, the plaintiffs, by leave of the court and consent of the defendants, filed an amended declaration containing four counts—Record, pages 3 and 4.

John Holmes, the ancestor of the plaintiffs, died leaving four children surviving him, to whom the land, out of which this action arose, passed by descent—Rec., page 13, deposition of Dr. John Holmes.

Mary A. M. Holmes, the eldest, died leaving four children surviving her. Her eldest child died unmarried; before the amended declaration was filed, her death was suggested, Record, page 3, and the first count of the amended declaration is in the name of the three surviving children of said Mary A. M. Holmes.

John Holmes, the second child of the ancestor, died before action brought, leaving four children surviving him, and the second count of said declaration is in their names as plaintiffs—Record, page 4. Seth C. Holmes, the third child of the ancestor, is living, and the third count of said declaration is in his name—Record, page 4.

Elizabeth E., the youngest child of the ancestor, is living and is the wife of William S. Whiteley, and the fourth count of said declaration is in their names as plaintiffs—Record, page 5.

To this declaration the plaintiffs in error appeared, by their attorneys, and plead the general issue of "not guilty—Record, page 3.

The jury rendered their verdict on said amended declaration—Record, page 7—finding for the plaintiffs in each count one undivided fourth part in fee of the premises in said declaration.

A separate judgment was rendered in favor of the plaintiffs in each count for an undivided fourth part, and four writs of possession were granted accordingly, one to the plaintiffs in each count.

The writ of error—Record, pages 57 and 58— describes a judgment in which all of the defendants in error are plaintiffs, and all of the plaintiffs in error are defendants.

Upon these facts it is submitted that the writ of error must be dismissed;

First, Because it was not sued out to a final judgment, and it is only final judgments that can be brought to this court by writ of error. Revised Statutes of United States, page 128, section 691.

It would have been error in the court below to have rendered a joint judgment in favor of all the plaintiffs, because there was no such verdict found by the jury, and the statute—see Virginia Code of 1873, page 962, section 29—requires that "the judgment for the plaintiff shall be that he recover the possession of the premises according to the verdict of the jury, if there be a verdict." Accordingly we have four distinct judgments and four writs of possession.

Can this error be corrected by amendment of the writ of error?

It is submitted that it cannot. Section 1005, page 187, Revised Statutes of the United States, provides for two classes of amendments of writ of error by this court. The cases in the first class are specified as follows: a mistake in the text of the writ, or the want of a seal to the writ, or that the writ is returnable on a day other than the day of the commencement of the term next ensuing the issue of the writ, or that the statement of the title of the action or parties thereto is defective. Neither of these is the error complained of here.

The second class includes "all other particulars of form." This is not a formal objection. It is substantial. "A writ of error is a commission by a superior court, by which they are authorized to examine the record upon which a judgment was given in an inferior court, and on such examination to affirm or reverse the same according to law;" 3 Bac. Ab. Error. This definition was used by this court in the opinion delivered by Mr. Chief Justice Marshall in Cohens vs. Virginia, 6 Wheat, 264. "The object of this writ is not to try the question between the parties; it is rather to try the judgment of the court below, to ascertain whether it has been given in conformity to or against the law. The writ of error is a new and original suit, and not a continuance of the original cause." This writ is not to the judgment of the court below.

To make this writ conform to the facts would be practically to grant a new writ; and, in this instance, that would be to allow the party to issue his writ after the Statute of Limitation had barred his right to a writ of error.

The citation is in accordance with the writ, and whilst it is admitted that in the case of a wrong return day, the writ may be amended notwithstanding the citation. yet to allow that in this case would be to disregard the citation in a case not provided for by Statute, and in effect to do away with the citation altogether, because being cited to answer one case, by amendment we are required to answer a wholly different case.

To allow amendment in such cases would be to encourage negligence in taking writs of error, and delay in their prosecution, to the great injury of the prevailing party in the court below. On the 5th of Nov., 1880, Record, page 8, a writ of error that should operate as a supersedeas was asked and granted. The writ was accordingly issued on the 9th of Nov., 1880; citation on 4th of Jan., 1881, and executed on the 7th of Jan., 1881. But no transcript of the record was filed, the counsel of the defendants in error supposing that the case was being regularly matured, and knowing that the case would not probably be reached for two years, and being remote from the place where the court is held, in Oct., 1882, applied to the clerk to ascertain when the case would probably be reached, when he learned that the transcript of the record had not been filed. It would have availed nothing then to have had the case docketed and dismissed under rule No. 9, because the right to sue out another writ had not then been barred.

On the 21st of that month, Oct., 1882, the writ complained of was issued and served on the attorneys of dedefendants in error, Record, pages 57, 58, 59, and the Record made off. Record, page 60.

It may be said that the Court will only look to the Record as it is presented. If that be so, the foregoing statement illustrates what may be done, if amendments are allowed in cases such as this.

Again: The plaintiffs in error have given bond with security to prosecute the writ, Record, page 59. Change the wit so as conform it to the four judgments actually rendered wholly different from the one named in the writ, and to prosecute which the bond was given, and are not the sureties thereby released?

But should the writ of error be amended, then this Court has no jurisdiction because the matter in dispute is not of the value of more than $5,000.

FACTS.

The land described in the declarations of the plaintiffs below is a tract of 3,000 acres in Lee county, Va., pages 4 and 5. Evidence of its value appears in the proceedings. See evidence of plaintiffs in error, page 49, and evidence of defendants in error, pages 52 and 53.

The declaration was drawn as provided by the Statute, Code of Virginia, 1873, page 959, section 10, which enacts that "the declaration may contain several counts, and several parties may be named as plaintiffs, jointly in

But is not the controversy confined to the parcels held separately as shown by Carr Bailey's report, Rec. 24–25, and which together make up the parcels of 242 acres, and 500 acres, which he mentions as the parcels in dispute. The defendants in error only recovered those parcels. The plaintiffs in error only contended for those parcels, and if they had succeeded they would have only gotten judgment for them. How then can be it said that more was in controversy?

It is true the declaration covers the whole tract of 3000 acres, but that is because of the form of the action, and for the sake of convenience in pleading. The Code of Virginia 1873, c. 131, sec. 7, provides that:

Sec. 7. "It shall be sufficient for the plaintiff to aver in his declaration that, on some day specified therein, (and which shall be after his title accrued) he was possessed of the premises claimed, and being so possessed thereof, that the defendant afterwards, on some day to be stated, entered into such premises, and that he unlawfully withholds from the plaintiff the possession thereof, to his damage such sum as the plaintiff shall state."

Sec. 8. "The premises claimed shall be described in the declaration with convenient certainty, so that from such description possession thereof may be delivered."

In this case, according to the uniform practice in Virginia, the defendants in error described the premises according to their own title papers. This practice avoids the delay, the expense and mistakes incident to a practice of attempting to describe the premises as claimed by the party defendant below.

Sec. 23. "If the jury be of opinion for the plaintiffs or any of them the verdict shall be for the plaintiffs, or

such of them as appears to have right to the possession of the premises, or any part thereof, and against such of the defendants as were in possession thereof or claimed title thereto at the commencement of the action."

Sec. 26. "If the verdict be for an undivided share or interest in the premises claimed, it shall specify the same, and if for an undivided share or interest of a part of the premises, it shall specify such share or interest, and describe such part as before required."

The title to the defendants in error was one and the same to the whole 3000 acres. The 242 and 500 acres were parts of the 3000 acres, so that of necessity the defendants in error, to show title to the parcels in controversy, had to show title to the whole 3000 acres, while in reality they only recovered the 242 and 500 acres. If the whole residue be in the adverse possession of others, the plaintiffs in error are not affected by the result in this case. The plaintiffs in error confined evidence of title in them to the 242 and 500 acre parcels, and if they had satisfied the jury that they had made good their contention, the recovery would have been the 242 and 500 acres.

It is true that the plaintiffs in error endeavored to show that the defendants in error never had title, or if so that it was forfeited, but that was to *support* their contention for the 242 and 500 acres, and *not* to show title in them to any part of the 3000 acres outside of said two parcels. Then is not Meredith vs. McKee, 1 Pet. 248, a case in point.

JOHN A. CAMPBELL,
Attorney for Defendants in error.

117-381

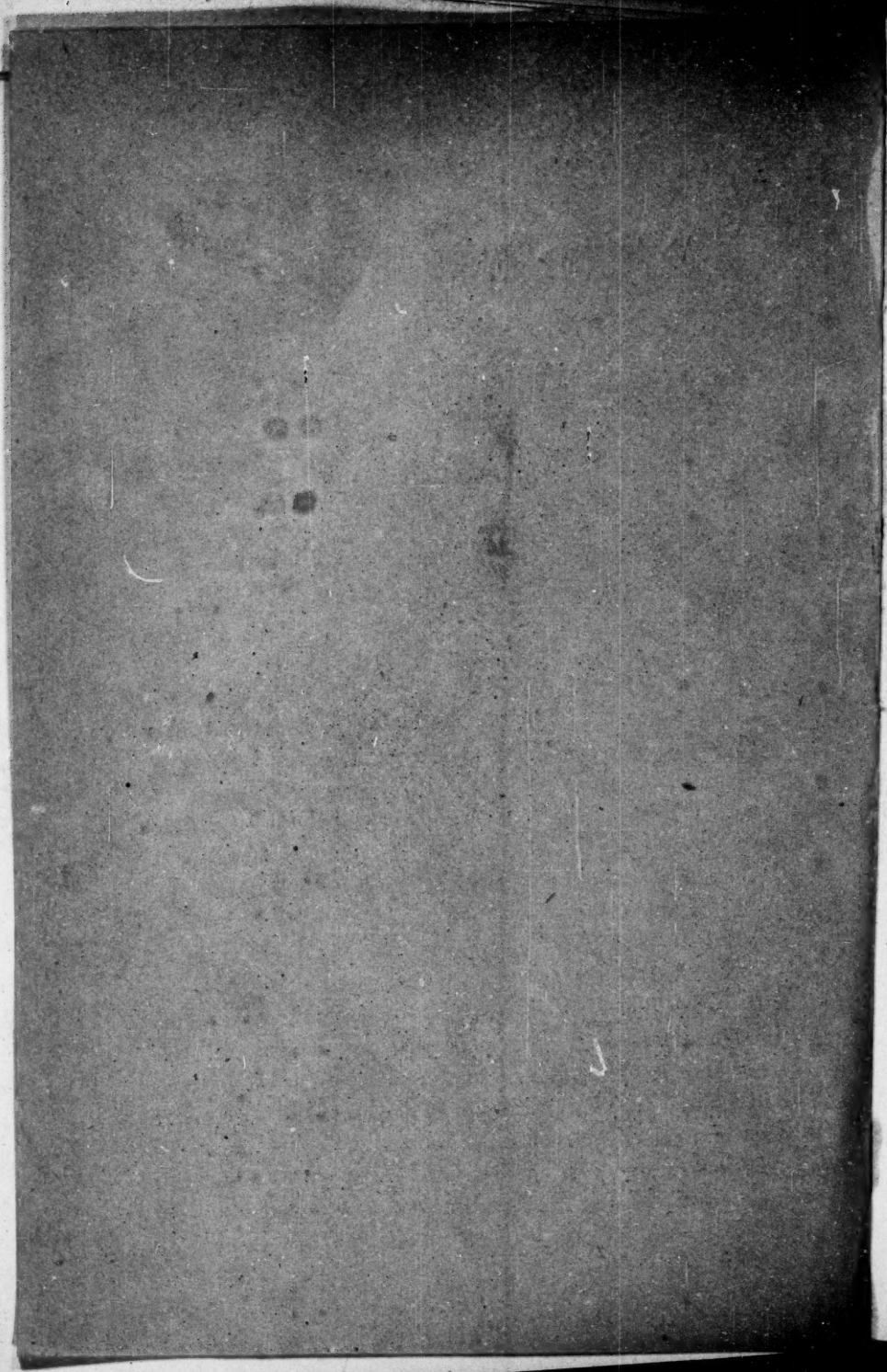
In the Supreme Court of the United States.

FULKERSON & OTHERS,
vs.
SETH C. HOLMES & OTHERS,

Plaintiffs in Error.
In Ejectment.
Defendants in Error.

Brief of John A. Campbell, for Defendant in Error.

Abingdon Virginian Steam Printing.



In the Supreme Court of the United States.

FULKERSON & OTHERS, } Plaintiffs in Error.
vs. } In Ejectment.
SETH C. HOLMES & OTHERS, } Defendants in Error.

Brief of John C. Campbell, for Defendant in Error.

On the trial of the case before the jury, after introducing the patent to Samuel Young, the plaintiffs then offered to introduce the deed from Samuel Young to Samuel C. Young, and the defendants objecting—Rec. 12, the plaintiffs to show the admissibility of the deed read to the Court—the deed with its certificates being in the hands of the Court—the depositions of Charles Bird and others. Rec. p. 12.

After hearing the evidence the court permitted the deed with its certificates, Rec. 10–11, to be read to the jury, and the defendants made objection, that "there was no evidence showing that said Samuel Young was dead, or that said Samuel C. Young was his heir, or that the deed offered was the deed of Samuel C. Young," Rec. p. 12.

It was not error to let the deed go in evidence to the jury. 1st. Because it was an ancient deed. 2d. The title

of the Holmes' was admitted by the junior patentees.

1st. It was an ancient deed, being more than sixty years old when it was produced to the court. Its possession and custody were satisfactorily accounted for, and its validity admitted, as the evidence shows. Rec. p. 14, 15.

It had been acknowledged by the grantor, Samuel C. Young, three days after its date before a judge of a United States Court, whose signature and handwriting, and death are proved. Rec. 12 13, F. M. Etting's dep.

The receipt for the purchase money follows Judge Peters' certificate of acknowledgment, and is witnessed by a disinterested witness.

The delivery is attested by two witnesses, one of whom is proven to be dead more than fifty years ago. The presumption is that the other is also dead. If the deed was forty years old that deed may be given in evidence without any proof of its execution; for the witnesses cannot be supposed to live above forty years. Gilbert's Law of Evidence, p. 88, 89. The present rule is now thirty years. ~~Rec. p. 11, 12.~~

The deed is recorded in the County Court of Lee County, Va. Rec. p. 11.

2d. Acknowledgment of title. John Holmes proves that John Holmes, the purchaser, owned the land. Rec. p. 14.

This witness further proves that he was on the land with Peter Fulkerson, that he talked with Peter and Frederick D. Fulkerson, and a Mr. Ewing in 1836 or 1837, and they recognized him as representing the owners of the land. It was "called the Holmes plantation." There were then no intruders upon it. When he visited it again

in 1859 he frequently heard it spoken of in the same way. Rec. pp. 14, 15. In short the ownership was notorious. James Fulkerson, Frederick D. Fulkerson, and John W. Fulkerson were sons of Peter Fulkerson. Record p. 50, dep. of Lee S. Fulkerson. This land was in view of Peter Fulkerson's door. Nat. Ewing's dep., Rec. 39.

Fred. and James Fulkerson offered to buy the land from the witness, John Holmes, in 1840, in 1846, and in 1847. See letter of Fred. D. Fulkerson, Rec. p. 21, and of James Fulkerson, pp. 22, 23, all subsequent to the recordation of the Holmes deed in their county.

3d. No adverse claim to that of Samuel C. Young, or that he was the only child and heir of Samuel Young, has ever been made or asserted by any one.

Is there room for reasonable doubt that the deed and its recitals and the letters of Frederick D. and James Fulkerson are genuine and true, and should have been read to the jury.

[redacted]

x Wilson vs Betts 4 Dessis 201.

In Virginia, the rule as announced by her Court of Appeals, in the well considered case of Caruthers vs. Eldridge, 12 Gratt, 670, upon a review of the authorities, is that an "ancient deed may be introduced as evidence without proof of its execution, *though possession may not have been held for thirty years in accordance therewith, if such account be given of the deed as may be reasonably expected under all the circumstances of the case, and will afford the presumption that it is genuine.* See especially, p. 687.

This decision is a leading case in Virginia to-day. And this, I understand, to be the rule of this Court. See Carver vs. Jackson, 4 Pet. 1, and Crane vs. Astor, 6 Peters, 598, and Deery vs. Cray, 5 Wall. 795, in which last case Mr. J. Miller cites with approval the two first cases. I understand all of the cases cited reject the doctrine that *possession* under an ancient deed is essential, and, as announced in Deery vs. Cray, *ubi supra*. "The only question is, whether the facts justify such a presumption," and in the language of that decision, peculiarly appropriate to the case at bar, I must say that, if they do so in any case. I do not see how the inference can be resisted in this case," ~~Id. 806,~~ where we have an ancient deed, without marks or evidences of alteration or tampering, but regular and formal on its face and in its certificates; produced from the proper custody by the proper parties; the land claimed by Holmes, vendee of Young, under it, the deed recorded in the proper office, the land standing on the land books of the proper county until improperly dropped therefrom, and soon thereafter restored and the taxes regularly paid or released; the title of the Holmes recognized and admitted by the junior patentees, both before and after the emenation of their patents, and the lands pointed out by Peter Fulkerson, the first junior patentee, to the agent of the Holmes's as shown not only by the agent but by Patrick Ewing—a son-in-law of one and brother-in-law of the other patentees, and witness introduced by plaintiffs in error; and though made and delivered in July, 1819, yet down to this hour in 1886, or if you please to Oct., 1880, the date of the trial in the Court below, no one contesting the heirship or disputing the right of Samuel C. Young has been heard of.

It is respectfully submitted that this case is widely different from those relied on by counsel for plaintiffs in error.

The second exception of plaintiffs in error, taken at the trial, is to the instructions of the defendants in error. Rec. p. 54, and is in the following words:

"The defendants objected to each of said instructions because they did not carrectly give the law of the case." Rec. 55.

The exception is to the whole charge given by the Court at the instance of the plaintiffs below. It is true that the objection is made to each instruction, but it is also true that it is a general exception to each, and therefore to both of the instructions. It fails to state distinctly —it fails to state at all—the several matters of law to which they except, and consequently the matters of law excepted to—if any there be—do not appear in the exception, as required by No. 4 of the Rules of this Court.

Harvey vs. Tyler, 2 Wall, 338.

But wherein is the first instruction erroneous? It is contended that the latter branch is erroneous. Brief of plaintiffs in error p. 5. If that be so, as the exception is general, must it not be overruled, as so much of the instruction as derives title to the defendants in error is plainly right, and is sufficient without that part which speaks of the recitals in the deed of Samuel C. Young. If, as required by this Court as an essential to a bill of exceptions, the attention of the court below had been called to the specific objection, it might have been removed. The exceptors in disregard of the rule prescribed by this Court have failed to do this.

But is not all objection to this instruction removed by the second instruction prayed by the plaintiffs in error and given by the Court. Rec., p. 55. That instruction reads:

"No. 2. The Court instructs the jury that the plaintiffs have attempted to show a right under Samuel Young's patent, and that they cannot derive title from Samuel C. Young, unless they prove to the satisfaction of the jury that Samuel Young's rights passed by deed, devise, or descent, to Samuel C. Young, under whom the plaintiffs claim. Given."

Thus we see at the *instance* of the plaintiffs in error, the question of Samuel C. Young's ownership of the land was directly submitted to the jury. They found that the patentees right passed by deed, devise, or descent to Samuel C. Young.

This is a question of fact which this Court will not review. The plaintiffs in error by asking for their instruction conceded claimed that there was evidence before the jury on which to base it. The instruction was given as prayed, and they are concluded by the finding of the jury upon the question thus submitted, "and whether that fact was rightly decided or not, according to the evidence, is not open to enquiry in this court."

Taney, Ch. J. in Bond vs. Brown 12 H. 256.

Again, the exception of the plaintiffs was to reading the deed, at all to the jury. Rec., p. 12.

The deed was evidence, beyond question, for some purposes.

The counsel of plaintiff in error—brief, p. 5—Say that:

"I. It was error in the Court to allow said deed to be read in evidence without instructing the jury that the recitals therein as to the death of Samuel Young and the heirship of Samuel C. Young was not evidence against plaintiffs in error, &c.

It is submitted that this objection was not made in the court below. See Rec. p. 12, and p. 55. Instructions No. 2½ and No. 3, where alone the subject is referred to by plaintiffs, in error.

The objection at p. 12 is to reading the deed for *any* purpose.

Instruction No. 2½ is believed to be but a repetition of the proposition substantially announced in No. 2, and as No. 2 was given it was unnecessary to give No. 2½.

Kelly vs. Jackson 6 Pet., 622, 628.

No. 3, p. 55, confines the jury to the recital that Sam'l. C. is the son and heir of Samuel Young.

This seems to be plainly erroneous. The province of the jury is to consider all the evidence submitted to them, and form their conclusions accordingly.

In this case there are leading facts which show that the junior patentees under whom plaintiffs in error derive title, *admitted* the title of the defendants in error and offered to buy the land, or to act as the agent of defendants in error to sell to others. Is not this case within the principle of the rule announced by Mr. J. Miller—speaking for the whole court—in Deery vs. Cray, 5 Wall., 795, *ubi supra.*

As to the second instruction, Rec. 54, 55, the objection of plaintiffs in error, brief p. 8, is that it ignores the question of forfeiture. It will be attempted to be shown in

considering instructions Nos. 4, 5, 6, of plaintiffs in error that this tract of 3,000 acres of land does not belong to either of the classes of land embraced by Act of 27th February, 1835, plaintiffs brief p. 6, Acts 1834–5, and the other acts cited therein.

But is the instruction otherwise erroneous. That a junior patent, taken by itself is, at most, only color of title will not be denied The whole legal estate and seisin of the Commonwealth pass to the first patentee Green vs. Liter, 8 Cr. 229.

It is equally true that a possession which perfects title against the rightful owner, must be adversary in its inception, and must so uninterruptedly continue to be for the statutory period.

"To constitute a possession adverse, the party setting up the possession must, in making his entry upon the land, act *bonafide;* he must rely on his *own* title; he must *believe* the land to be his, and that he has title thereto, although his title may not be rightful or valid." Tyler on Eject. and Ad. Enjoyment p. 887.

"And it has been often said and decided that the fact of possession and the *quo animo* the possession *was taken* are the only tests. If the *quo animo* is a *bonafide* intention to enjoy his own property, that intent can never exist where the possessor knows the property is not his own." Mr. Ch. J., Savage, in Livingston vs. Peru Iron Co., 9 Wend. 527.

Clark vs. McClure, 10 Gratt. 305.

Kincheloe vs. Tracewells, 11 Gratt.

In this case it is shown by the declarations, oral and written, and the acts of the parties under whom the

plaintiffs in error claim, that they were aware of and recognized the right and title of the defendants in possession. See Dep. of John Holmes, Rec. 15, 16, and letters of Frederick D. and James Fulkerson, pp. 21 to 23, and the deposition of Nathaniel Ewing, Rec. p. 29, son-in-law of Peter Fulkerson. It is true he says that Dr. Holmes said that he would not pay the tax on the land and would have nothing more to do with it. But this cannot prejudice the owners of the land, nor is it believed to be true, because it is in conflict with the acts and declarations of Holmes and of all the parties about that time. The deed was recorded in Lee county at the court immediately following Holmes' visit, Rec. 11. The land was then on the Land Book. Rec. p. 23—and the taxes paid. See p. 51-2—Letters of F. D. and Jas. Fulkerson.

The entry was to protect an acknowledged title in the Holmes heirs, and not with intent to hold the land in the belief that the parties entering were the rightful owners.

But it may be said that notwithstanding, it is true that the junior patentees, under whom the plaintiffs in error claim may have acknowledged the Holmes title, yet their vendees purchased in good faith and in ignorance of the Holmes title and are therefore not affected by the conduct of their vendors.

In view of the facts just above referred to, this would be a *violent* presumption certainly. But if it can be entertained, it must be at the sametime admitted that the deeds of the said patentees did not pass title, but at most were only color of title, to be perfected by a proper subsequent possession. Now this question, was at the instance of the plaintiffs in error, by their instruction. No.

7. Rec. p. 56, submitted to the jury, who found against the plaintiffs in error.

Instructions Nos. 4, 5, 6, tendered by plaintiffs in error, Rec., pp. 55-6, present the question of forfeiture as contended for by them and that the law as shown by the Acts of Assembly cited and quoted in their brief at pp. 6, 7, 8, is for them.

It further appears that the Acts cited at p. 6, 7, 8, of said brief as Acts 1835–6, 1836–7, and 1838, are based upon the second Sec., of Acts of 1834–5, passed on 27th of February, 1835, and merely refer to and provide for lands forfeited or liable to forfeiture under the Acts of 27 February, 1835.

In order then to pass intelligently upon the action of the Court below in declining to charge as requested by plaintiffs in error, it is important to ascertain what lands are affected by said Act of 27th, February, 1835.

This, it is respectfully submitted, cannot be done if the examination be confined to the section as quoted by plaintiffs in error. The section shows that something has preceded it which is essential, something to which the word "*such*" refers, and without which the section is unintelligible. That something is the preamble to the said section, and reads:

"And whereas it is know to the General Assembly, that many large tracts of land lying west of the Alleghany mountains which were granted by the Commonwealth before the first day of April, eighteen hundred and thirty-one, never were, or have not been for many years last past, entered on the books of the Commissioners of the revenue where they respectively lie; by reason

whereof no forfeiture for the non-payment of taxes has occurred, or can accrue, under the existing laws, the Commonwealth is defrauded of her just demands, and the settlement and improvement of the country is delayed and embarrassed; for remedy whereof.

"2nd. Be it therefore further enacted, That each and every owner of any such tract or parcel of land" &c.—Acts of 1834–5, p. 12, quoted at p. 6. brief of plaintiffs in error. This preamble shows two classes of land which are affected by said section 2.

1st. Lands which "*never were*" entered on the Commissioner's books.

2nd. Land which had "*not been for many years last past,*" entered on said books.

Let us see if the land in litigation belongs to the 1st. class. Does it appear in evidence that the 3000 acres tract *never* was on the Commissioners books where they respectively lie? If it was there only once, it has been there and hence does not belong to the first class. If it *never* was there it is incumbent on the plaintiffs in error, who claim the benefit of an alleged forfeiture to show it. It is not proving a negative, it is proving affirmatively what the books of the Commissioner of the revenue show. It is proving the affirmative fact of forfeiture. Have the plaintiffs in error made the proof? They have not. There were three places to go to ascertain the fact, and they have only gone to one.

When the patent for the 3,000 acre tract was issued, the land laid in Washington county, Rec., p. 9, in whose Court-house at Abingdon, this case was tried. Yet no books of Washington county are mentioned in the case.

Six years after the emanation of said patent, in 1793, the county of Lee, where the land lies, and where plaintiffs in error reside, was formed, and yet I find no mention made of the Commissioners books of that county.

The only evidence offered is the certificate of the Auditor of Public Accounts, Rec. p. 50, and that only shows that prior to 1827, the books of Lee county are missing, but it does not show nor pretend to show that this land was never upon the Commissioners books. Suppose the Land books are missing from the Auditors office. Suppose no trace of them can be found any where. Instead of proving plaintiffs case, it shows beyond controversy that they cannot prove it.

The plaintiffs in error having thus, so signally failed to bring this tract of land within the first class, the class of lands which "*never were*" on the Commissioners books, having gone further and shown, that for forty years, that is, from the date of the patent in 1787, down to 1827, they did not *offer* to show that the land was not on the Commissioners books, it would, it is respectfully submitted, have been error to charge the jury upon a legal proposition, which had no evidence to support it. And that is clearly true here, unless it can be maintained, that when a party shows his failure, his inabilty, to establish an essential fact, the jury must find that because an alleged fact cannot be shown to exist, therefore it does exist.

But the certificate of the deputy sheriff of Lee county made in 1837, when the junior patentees were living shows that this identical land was returned in 1834 as not ascertainable. He could not have made that certifi-

cate except the Commissioners books had shown the fact to be as he certified, Rec. p. 51.

Having shown that the plaintiffs in error have failed to bring this tract within the first class of lands, let us see if it belongs to the second class.

The second class embraces those lands which were not for many years prior to 1835 entered on the Commissioners books, with the further limitation made by said section 2, cited by plaintiffs in error. That section limits or confines the forfeiture to the lands thus omitted for many years, "the taxes and damages (of) which would not have been relinquished and exonerated by the second section of the Act concerning delinquent and forfeited lands, passed March 10th, 1832, had they been returned for their delinquency prior to the passage of that Act."

We must then ascertain what lands *were* exonerated by said second section of March 10, 1832, because those lands are excepted from the operation of Section 2, of February 27, 1835, which is confined by its *words* to the lands, *not exonerated* by said Act of March 10, 1832.

The plaintiffs in error having omitted this act of March 10, 1832, which seems to be essential to a correct understanding of the acts relied on by them as shown in the brief of their counsel. I quote it:

"2. Be it further enacted that the taxes and damages due and "chargeable upon lands and lots lying in any of the counties of this Commonwealth, west of the Alleghany mountains, returned delinquent for the non-payment of taxes thereon for the year one thousand eight hundred and thirty-one, or for any year or years prior thereto, and which hall have been redeemed or exonerated from arrears of

taxes thereon, in pursuance of former laws, allowing such redemption and exoneration, and prescribing the manner, terms and times thereof, if the amount of taxes, exclusive of damages, charged upon any tract or lot of land so returned delinquent, shall not exceed ten dollars, shall be, and the same are hereby relinquished, and the lien held by the Commonwealth or literary fund upon such delinquent lots or lands, forever discharged." See supplement to Rev. Code of 1819, p. 357, ch. 290, sec. 2.

We see then that the lands belonging to the second class are those which were *omitted* from the books of the commissioner of the revenue for many years, next preceding the passage of the act of 27th of February, 1835, and the *taxes and damages on which exceeded ten dollars*, and yet there is *no* evidence of the sum of the taxes and damages in arrear on the 3000 acres, and consequently there can be no forfeiture, because this tract does not belong to the second class of lands liable to forfeiture under the act of 27th of February, 1835, cited in plaintiff's brief at p. 6; and accordingly the auditor's certificate, introduced by *plaintiff's* in error. Rec., p. 50, shows that the taxes were released down to 1832.

It thus appears that the plaintiff's in error have failed to show that this tract belongs to either class of the lands liable to forfeiture under said act, and that as their instructions were based upon that act as modified by the other acts cited by their counsel, there was no error in refusing to give said instructions.

Further, as to the courts rejecting instructions, four, five, and six:

No. 4 is manifestly wrong, because it declares the law

to be, that though the taxes and damages may have been assessed and paid, yet, if the lands were not on the commissioner's books prior to first of November, 1836, they were forfeited. This is not the law. On the contrary, the acts of 1836-7, quoted by plaintiff's counsel, extends the time until January 1838, and the acts of 1838, quoted by same, extended the time to first of July, 1838, before which time the land was on the commissioner's book. Rec. 52.

The court could not give No. 5, Rec. p, 56, because it asks the court in effect to say to the jury that they may find against or ignore the uncontradicted evidence of two witnesses. The commissioner's book, Rec. p. 52, and Job Crabtree's—the sheriff's certificate. Rec. p. 23. This evidence is not in conflict with any other evidence, and the jury could not refuse credence to it.

This instruction further is that the patent to Peter Fulkerson, Sr., of October 30, 1838, and the patent to James Fulkerson and others, of 31st of October, 1846, if the 3000 acres were forfeited vested title in the said patentees, without regard to the *bona fides* of the patentees, yet the section of the statute relied on by the counsel of the plaintiff's in error, protects, not any or every occupant, but only *bona fide* occupants. Wilds, Lessee vs. Serpell, 10, Gratt. 410.

Instead of being *bona fide* occupants it is clearly shown, dep. of John Holmes, Rec. p. 15. Letters of Frederick D. Fulkerson, Rec. 21-2, and of James Fulkerson, 22-3, that the locality and ownership of these lands were known; were notorious; were known to these junior patentees; were in view of their door. See dep. of Nat.

Ewing, Rec. p. 39, that it lay on Poor Valley Ridge, Id.

There is little room for doubt that the 300 acres mentioned in the auditor's certificate is the Holmes land.

No. 6 was properly rejected, because it refers a question of law to the jury, which properly belonged to the court. It was for the jury to find the facts proved, and for the Court to say whether the facts thus found, made out a case of forfeiture.

No. 7, Rec., p. 56. The record shows that this instruction was given. See Rec. p. 57. So that the counsel for plaintiffs in error is mistaken when he includes No. 7, as one of the rejected instruction. See his brief, p. 4.

Under this instruction the jury found that the plaintiffs in error had not held "continuous, uninterrupted, adversary possession."

As plaintiffs in error have neither filed an assignment of errors with their writ of error, nor has their counsel in his brief assigned any error as to instructions, Nos. 8, 8½ 9, 10, I conclude that objection to the ruling of the Court as to them has been abandoned.

JOHN A. CAMPBELL,
Counsel for Defendants in Error.

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117-401

SUPREME COURT

—OF THE—

UNITED STATES.

No. 159.

MARY A. HOYT (now Mary A. Vestel) and JOHN W. GONU,
PLAINTIFFS IN ERROR,
vs.
JOSEPH H. RUSSELL.

WM. CHUMASERO,
Attorney for Plaintiffs in Error.

Helena Herald: Job Printing and Binding.

SUPREME COURT

—OF THE—

UNITED STATES.

OCTOBER TERM, 1885.

No. 159.

MARY A. HOYT (now Mary A. Vestel) and JOHN W. GONU,
PLAINTIFFS IN ERROR,
vs.
JOSEPH H. RUSSELL.

Error to the Supreme Court of the Territory of Montana.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT OF CASE.

Joseph H. Russell, the defendant in error, on the 21st day of January, 1878, filed his complaint in the Third Judicial District Court of Montana, alleging that on the 25th day of October, 1877, he was, and ever since had been, the owner of, possessed of, and entitled to the possession of, the "J. H. Russell Lode."

That on said 25th of October, 1877, the plaintiff in error, Mary A. Hoyt, made application for a patent for the portion of J. H. Russell lode described in complaint, and that she still claimed title and right of possession thereto.

That on the 24th of December, 1877, defendant in error interposed his adverse claim claiming to be the owner of, and

lawfully seized and possessed of the property prior to any claim of defendants; and prays decree for the possession, etc.

Mrs. Hoyt and Gonu answered, denying that on or at any time since May 13th, 1873, Russell was the owner of or entitled to the possession of any portion of the described premises; and allege that on the 13th of May, 1873 (they being at that time citizens of the United States,) discovered upon public lands of the United States, in Ten Mile Mining District, in the county of Lewis and Clarke, Montana Territory, a valuable mineral deposit, to-wit: a silver bearing quartz lode, which they named the Mammoth lode, and staked said lode by placing a substantial stake marked "A" 150 feet north-westerly from the center of discovery hole, in a line drawn at right angles with the general apparent course of the lode; running thence north-easterly along the northerly side of said lode to a stake marked "E," 750 feet from stake A; thence southerly along the easterly line 200 feet to a stake "D;" thence southerly 1500 feet along southerly side line to stake marked "C;" thence north-easterly along the westerly end line to stake marked "B" 200 feet; thence north-easterly to the place of beginning. And on the 29th day of May, 1873, filed a declaratory statement on oath in the Recorder's office of Lewis and Clarke county describing and giving notice of said claim, whereby they became the owners and entitled to the exclusive possession thereof. That Gonu by deed conveyed his interest therein to said Mary A. Hoyt. That on 25th day of October, 1877, she filed in the Helena land office her application for patent for said Mammoth lode, embracing in the description of said lode the premises described by said Russell in his complaint. That at the time of the discovery and location of the Mammoth lode the premises embraced in the location and described in the application for patent were unoccupied and unrepresented mineral lands of the United States, and subject to such location under the laws of the United States.

That said Mary A. Hoyt and her predecessors in interest had been in the quiet and peaceable possession of the premises (holding and claiming the same adversely to plaintiff) for more than four years before the commencement of the suit,

and that neither the plaintiff or any of his predecessors was, or were possessed thereof at any time within such four years. That Russell had not any right, title, interest or right of possession in or to any part of the premises; and praying that she be declared entitled to such possession.

No replication was filed by Russell to the answer of Mrs. Hoyt and Gonu. A trial was had and testimony taken on the part of the plaintiff. Russell himself was introduced, and testified that he and one Basset discovered the J. H. Russel lode on the 27th of July, 1867; that they staked it by placing posts about 1100 feet on each side of the shaft; that the claims were not staked except at each end of discovery claim; that the stakes staid up about two years; that Marsh, a deputy mineral surveyor, made survey, and that witness showed him where the lode was and discovery hole.

Marsh testified that he surveyed the Russell claim easterly through Mammoth claim; that he looked for stakes, but did not see any.

Russell being recalled testified that he staked the Russell lode the way he supposed it to run, but afterwards discovered that it did not run as he had staked it, but *could not remember* whether he discovered the mistake before or after the location of the Mammoth lode, and did not know how much the lode varied from the original location.

A record of notice of location of J. H. Russell lode dated 30th July, 1867, was introduced and read in evidence under objection and exception of defendants. [See the notice on page 8, marginal 20 of transcript.]

Flick testified that he helped Marsh to make survey as chainman.

The plaintiff introduced some specimens of quartz and closed his case

The defendants then introduced as witness George Foote, an old mineral surveyor of large experience, who testified that he made a survey and plat of the J. H. Russell lode as originally staked and claimed, and as surveyed by Marsh; and also of the Mammoth lode. That he made the diagram [See plat on page 24—marginal.] and that the survey of J. H. Russell lode, as shown on plat, was made in accordance with the

course of the vein; that he saw the discovery stake and course of the vein, and that the course of vein of Russell lode was not as surveyed by Marsh; that he examined the discovery shaft, and that it was only a seam of decomposed granite and not a lode, and that there were no indications of quartz; and contradicts Marsh's evidence in nearly every important particular, and shows that as originally located there was no conflict of surface ground between the Russell and Mammoth lodes, and that the ore in Mammoth was galena and carbonate and native silver. [See his evidence, marginal pages 2, 3, 4 and 5 record."

Essler testified that he was a practical miner and assayer, and that the vein of Russell lode was parallel with Mammoth, and that there were no indications of a lode on Russell claim, and that he assayed samples from the Russell lode from discovery and two other holes; that there was neither gold or silver in them (page 28 record,) and that the location called Russell lode was a mere bunch of quartz—not a lode.

Perry, a miner, testified that he took samples from five or six different places (10 or 12 pounds of ore) from discovery hole, from places east and west and from the cuts, and took them to United States assay office; that the samples taken were fair and the best he could find; that he saw stake a short distance from discovery marked "J. H. Russell Lode;" that if there was a lode it would run parallel with the Mammoth, but that he examined the cuts, cleaned them out, and that there were no indications of a lode, and that there was nothing in the Russell lode that resembled the specimens shown by plaintiff.

R. B. Harrison, U. S. Assayer, testified that he assayed the specimens left by Perry, and found no gold or silver in them, having made six assays.

Davis testified that he saw the Russell location and discovery hole in 1868, and every year thereafter until 1874, and was in discovery hole a number of times afterwards, and that there were no indications of any vein; that the ore of Mammoth resembled Russell's specimens.

To the same effect is the testimony of McDonald, Frost and Gilmore.

The defendants then offered in evidence their notice of location of the Mammoth lode, found on page 37 (marginal) of transcript. Plaintiff objected to its introduction in evidence, and the court sustained the objection, and it was excluded and the defendants excepted.

On motion of plaintiff the court struck out and excluded from the consideration of the jury all the evidence of the defendants' witnesses in regard to the character and value of the ores and rock testified to by them. The defendants placed a witness on the stand for the purpose of showing that the defendant had held the actual, exclusive and uninterrupted adverse possession of the lode in question for the statutory period of limitation; and asked of him the following question: "State " if you know who has had the actual, exclusive and uninter- " rupted possession of the ground in question from May 13th, " 1872, up to the time of the commencement of this suit." The plaintiff objected to the question, and the court sustained the objection, and the defendant took an exception.

The defendant then offered evidence to show that the Mammoth lode claimed by defendant was a large, well defined lode or lead bearing valuable rock and quartz, rich in silver, with well defined walls, continuing from discovery shaft on the Mammoth lode easterly across the ground claimed by plaintiff, and that such Mammoth lode was and is a separate and distinct lode or lead from that claimed by plaintiff as the J. H. Russell lode. To which evidence the plaintiff objected and the court sustained the objection, and the defendant excepted; and the court thereupon instructed the jury to find for the plaintiff.

The defendant then asked the court to give the 13 instructions found on pages (marginal) 44 to 52 inclusive, which were each severally refused, and to which refusal the defendants excepted, and the exceptions were duly signed by the judge presiding at the trial.

The case was then submitted to the jury under the instruction asked for by the plaintiff, and a verdict rendered by it for the plaintiff, upon which judgment was rendered.

A motion for new trial was then made, which was overruled, and the defendant duly excepted.

The defendants Hoyt and Gonu appealed from the judgment, but the Supreme Court of the Territory affirmed the decision of the lower court, and thereupon the defendants brought the case to this court for final decision.

ASSIGNMENT OF ERRORS.

The court below erred—

1st. In admitting and receiving in evidence the record of the location of the J. H. Russell lode.

2d. There was not evidence sufficient to justify the verdict, and it was against law. The evidence did not show that there was a lead or lode containing gold and silver called the J. H. Russell lode. The evidence did show that the J. H. Russell lode was not surveyed as the same was staked and recorded by the plaintiff. The evidence did show that the Russell and Mammoth lodes were distinct and separate lodes, and that the surface ground claimed by plaintiff did not include any part of the Mammoth location.

3d. The court erred in admitting in evidence the record of the location of the so called J. H. Russell lode; the court erred in excluding the notice of location and record thereof of the Mammoth lode.

4th. In striking out the evidence in regard to the value of the J. H. Russell vein.

5th. In refusing to allow defendants to prove their adverse possession of the ground in controversy.

6th. In giving the instruction on part of plaintiff.

7th. In refusing to give the several instructions asked for by defendants numbered 1 to 13 inclusive.

POINTS ON BEHALF OF PLAINTIFFS IN ERROR.

Section 1 of the original mining law of July 26th, 1866, provides that the mineral lands of the United States shall be open to exploration and purchase by citizens of the United States, and those who have declared their intention to become such, being substantially the same as section 2319, Revised Statutes. It did not appear in this case, either from plaintiff's notice of location or from his complaint, that he was one of the persons authorized by the statute to make such location;

nor was there any evidence in the case tending to show that fact. The record shows that all the evidence introduced was contained therein. [See (marginal) page 52 of record.]

The plaintiff's notice of location shows (marginal page 20 of record) that plaintiff and one Bassett claimed as discoverers 200 feet for their discovery, Morris and Bassett claiming the westerly 100 feet of discovery, and claims one, two and three westerly from discovery. Charles Rumley claims four, and C. R. Stewart five westerly; Russell easterly half of discovery; Flick, Ewing, Wilkinson, and Campbell, numbers one, two, three, four and five easterly from discovery, each claim being 200 feet in length, showing that Russell the (plaintiff) only owned one hundred feet east of the discovery claim of the J. H. Russell lode, which, as shown by the plat on page 24 of record, would not bring the ground he shows himself to be entitled to up to the south line of the Mammoth location; and he has not, either by his pleadings or evidence, connected himself in any way with the title of the other locators of the J. H. Russell lode, and was not entitled to the decree.

The mining laws of the United States, act of 1866, section 2, under which the location of the J. H. Russell claim was made required that such location should be of a vein or lode of quartz bearing gold, silver, cinnabar or copper. The notice of location does not show that the Russell lode contained either; nor was there any evidence introduced by plaintiff tending to show that it did so, while the evidence of the defendants conclusively established the contrary.

Overman S. M. Co. vs. Ceredran, 15 Nev., 152.
Foote vs. Nat. M. & Ex. Co., 2 Mont., 403.
McKeon vs. Frisbee, 9 Cal., 137.
Wolfley vs. Lebanon M. Co., 4 Col., 116-117.
Golden Terra M. Co. vs. Maher, et al., First Ind. Dist. Dakota.
Van Zandt vs. Argentine M. Co., 2 McCrary, 159.
Jupiter M. Co. vs. Bodie M. Co., 7 Sawyer, 96.
Laws U. S., Sec. 2320.
Laws Montana T. 1864, page 327, Secs. 2-5.

The plaintiff's survey for adverse claim was for an entirely different piece of ground from that located, and varied materially from the recorded notice of location of the J. H. Russell claim, and under the plaintiff's own testimony the suit should have been dismissed. [See Russell's testimony, marginal

page 19; also plat on page 24, and Foote's evidence pages 25 and 26; Essler's evidence, page 28-9; Gilmore's evidence, pp. 34, 35; also Marsh's evidence, p. 19.]

Gleason vs. Martin White Co., 13 Nev., 442.
Golden Fleece vs. Cable Co., 12 Nev., 330.

The evidence showed that the Russell and Mammoth were entirely distinct and separate veins. [See evidence of Foote and Essler before referred to; also that of Perry, p. 30, 31; of Davis, 32; of McDonald, 32; Frost, 32, 33; also plat on page 24.

The plaintiffs in error in their answer claimed possession of the premises in controversy, and the making of a discovery of a valuable mineral deposit therein on May 13th, 1873, and a location thereof on that date, and a continued adverse possession ever since that time. At that time there was no evidence, either on the ground or by any notice recorded or otherwise, that any one claimed any interest in the property adversely to plaintiff in error, and no such claim was made until after she made application for patent and until December 24th, 1877, when Russell interposed his adverse claim..

The plaintiff's action was barred by the statute of limitations of Montana, which was set up in the answer and which was not denied by replication.

Laws of Mont. T. 1872, p. 591, Sec. 2.
420 Co. vs. Bullion Co., 9 Nev., 240.
3 Saw., 644-657.

The court below refused, however, to permit plaintiff in error to prove her adverse possession of the premises, [See bill of exceptions, page 42 (marginal) of record.] which we contend was erroneous.

The plaintiff in error offered evidence to show that no mineral lead, lode or ledge existed at the Russell discovery shaft, and that no such lode existed or extended from the discovery shaft into the ground in question, and introduced several witnesses who testified to the non-mineral character of the Russell lode. [See bill of exceptions, marginal page of record 41, and the evidence of Essler, Harrison, Davis, and others.] But the court struck out and excluded from the jury all evidence to that effect, which was error. The evidence

was competent both on the question as to the validity of the Russell location and as tending to impeach Russell's testimony, on which questions we cite the cases—

15 Nev., 152.
9 Cal., 137.
2 Mont., 403.
4 Col., 116, 117
2 McCrary, 159.
7 Saw., 96.

The Mammoth lode was located under the act of Congress of May 10th, 1872, and under the Montana act, approved 26th December, 1864, [See laws of Montana of 1st legislative session, section 6.] which is as follows: "Notice of the discovery "or pre-emption upon any lead, lode or ledge shall be filed for "record in the county recorder's office of the county in which "the same may be situated within fifteen days of the date of "discovery or pre-emption, and there shall at the same time "be an oath taken before the recorder that the claimant or "claimants are each and all of them *bona fide* residents of the "Territory of Montana." But there was not anything in the act by which a failure to so record worked a forfeiture; nor is or was any record required by the laws of the United States. Section 2324, laws U. S., only prescribe what such record, if one be required by the local laws, shall contain—not a word requiring any affidavit. The object of the record being only to give notice of the fact that a location has been made. In this case a record was made, and the plaintiffs in error were in actual possession from the date of location until the commencement of the action.

By an act of the legislature of Montana, passed May 8th, 1873, session laws of 1873, page 84, it was provided: "Sec. "1. Any person or persons who shall *hereafter* discover any "mining claim * * * shall within twenty days thereafter "make and file for record in the office of the recorder of the "county in which such discovery is made a declaratory state- "ment thereof in writing on oath, before some person author- "ized by law to administer oaths, describing such claim in the "manner provided by the laws of the United States." The only provision in reference to the recording of such claim is found in section 2324, laws of U. S., and is as follows: "All "records of mining claims hereafter made shall contain the

" name or names of the locators, the date of location, and such " a description of the claim or claims located, by reference to " some natural object or permanent monument, as will identify " the claim."

Even if an affidavit were required we urge that the one taken to the Mammoth notice was sufficient. But the act of 1873 was passed on the 8th day of May, and did not go into effect at the place where the Mammoth lode is situated until the 19th or 20th day of May, seven days after the discovery of the Mammoth lode, and therefore was not applicable.

By an act passed by the legislative assembly of Montana on the 12th January, 1872, Sec. 785 of the Revised Statutes of Montana, page 572, it was provided: "All acts and joint " resolutions which declare that they take effect from and after " their passage and approval by the Governor are hereby de- " clared to so take effect only at the seat of government, and " in other portions of the Territory allowing fifteen miles from " the seat of government for each day."

The seat of government at the time of the passage of the act was at Virginia, in Madison county. The plaintiffs' complaint alleged and the answer of the defendants admitted, that the premises in question were situated in Ten-Mile mining district, in Lewis and Clarke county, in township No. 8, N. R. 5 west.

We contend that the court was bound to take judicial notice of the boundaries of Madison county, and of the other counties of the Territory, and their distance from each other as fixed and established by law. [See laws of Montana 1872, page 430, sections 2 and 6, establishing the boundary lines of counties by courses and natural objects located and laid down upon government maps, from which distances could be calculated, and from which it is demonstratable that the distance from Virginia to the Mammoth lode is over one hundred and fifty miles.] Courts are bound to take judicial notice of surveys of public lands.

Mossman vs. Forest, 27 Ind., 233.
Hill vs. Bacon, 43 Ill., 477.
Atwater vs. Schenck, 9 Wis., 160.
Wright vs. Phillips, 2 Greene Iowa, 191.
Kile vs. Town of Yellowhead, 80 Ill., 208.
Gardiner vs. Ebenheart, 82 Ill., 316.
Murphy vs. Hendricks, 57 Ind., 457.

Of distances as calculated on a map.

Mouflets vs. Cole, L. R. En. C. 71.

Of what is generally known within the limits of the court's jurisdiction.

Brown vs. Piper, 1 Otto (91 U. S.,) 371.

Of the boundaries of the several States and judicial districts. [*Id.*] See also—

U. S. vs. Lavengeance, 3 Dal., 297.
Peyroux vs. Howard, 7 Pet., 342.
Mossman vs. Forest, 27 Ind., 233.
Cash vs. Auditor, 7 Ind., 227.

Courts of particular States are bound to take judicial notice of its boundaries, divisions into towns and counties, and their limits and its judicial districts.

Lyell vs Lapeer Co., 6 McLean, 446.
United States vs. Johnson, 2 Saw., 482.
Buchan vs. Whitman, 36 Ind., 257.
Goodwin vs. Appleton, 22 Mo., 453.
Ham vs. Ham, 39 Me., 313.
Keyser vs Coe, 37 Conn., 597.
Winnipisiogee Lake Co., 40 N. H., 420.
State vs. Powers, 25 Conn , 48.
Commissioners vs. Spitzler, 13 Ind., 235.
Ind. & Cinn. R. R vs Case, 15 Ind., 42.
Buckingham vs. Gregg, 19 Ind., 401.
Hinckley vs. Beckwith, 23 Wis., 328.
Wright vs. Hawkins, 28 Tex., 452.
Brown vs Elms, 10 Humph., 135.
King vs. Kent, 29 Ala., 542.
People vs. Robinson, 17 Cal., 363.

The court committed manifest error in excluding the notice of location of the Mammoth lode.

We contend that in an action brought under the mining laws of Congress on an adverse claim, that the plaintiff before he is entitled to a judgment for the possession of the property as against an applicant for patent must show his right to contest such application by establishing his own right to the possession.

1st. By allegation in his notice of location, in his complaint, and by proof on the trial of citizenship.

2d. By proof that prior to the location, or at least before any adverse claim was made, he had discovered a vein or lode within the limits of his claim carrying gold, silver, cinnabar or copper, being the mineral deposits named in the statute of 1866, under which his location was made.

3d. By making a record of the location, giving a description of the ground located.

None of which was done by the plaintiff in this case, and that he was not under his pleadings and proofs entitled to a